Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1998

JOSEPH J. LAVODIE, Successor Director-Trustee
for 3011 Corporation, T/A U.S. Books; and
L.R. News, Inc., T/A Edgewood Books,
Petitioners,

vs.

JOSEPH I. CASSILLY, Individually and as
States Attorney, Harford County, Maryland;
M. TERESA GARLAND, Individually and
as Assistant State's Attorney, Harford County,
Maryland; and J.R. TAYLOR, Individually and
as Deputy Sheriff, Harford County, Maryland,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Fourth Circuit

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QUESTIONS PRESENTED

1. WHERE, AS HERE, THE District Court based upon its review of the sworn complaint, affidavits testimonial and other evidentiary exhibits and pleadings as well as state law found the existence of genuine issues of material facts which precluded summary judgment, upon Defendants "qualified immunity" claims, was it error for the Court of Appeals, under the facts presented, to jurisdictionally entertain this interlocutory appeal and reverse the trial court and order entry of immunity contrary to the Court's rulings in Johnson v. Jones 515 US 304 and Anderson v. Liberty Lobby, 472 US 242?

2. Did the Circuit Court err in determining that the warrant application, the search warrant which issued solely upon the basis of police officer conclusory assertions, which authorized officers to search for and seize speech works, as well as the resulting mass seizure and suppression of all copies of speech works. Those officers determined were seizable thereunder, without affording a prior, or a subsequent adversary hearing, was permissible under this Court's decision of Heller v. New York, 413 US 483 and Ft. Wayne Books v. Indiana, 489 US 46 which were similarly prohibited under the holdings of Lee Art Theaters v. Virginia, 392 US 636, Marcus v. Search Warrants, 367 US 717, Quantity of Books v. Kansas, 378 US 205?

3. Was it firmly established constitutional law under Roth v. U.S., 354 US 487 and Miller v. California, 413 US 15 that the prior Hicklin test of obscenity, as based upon single passages or single depictions and descriptions of sexual conduct, for condemnation of that entire speech work, was unconstitutional and that the

condemnation and seizure of presumptively protected speech works required the person making that determination of obscenity or other condemnation to take and consider the entire work as a whole contrary to the facts and circumstances presented below?

4. Did the Circuit Court below err in ordering the entry of summary judgment "qualified immunity" on the basis of inferences applied against Petitioners which inferences were contrary to the facts as well as the established Maryland law in Marguis v. State, 289 A2d 408 which limited Respondent's conduct in their civil suit arising out of the seizures, to using the works only in condemnation and destruction proceedings they filed and barring their later use as criminal evidence, which adverse application of the inference was contrary to Anderson v. Liberty Lobby, 477 US 242 and Adickes v. S.H. Kress & Co,, 398 US 144?

5. Did the Circuit Court err in its ruling that Respondents Taylor, Cassilly, and Garland were entitled to qualified immunity and that they did not engage in conduct in violation of clearly established First, Fourth, and Fourteenth Amendment law contrary to the ruling of the trial court?

LIST OF PARTIES TO THE PROCEEDINGS UNDER RULE 14.1(B) and ENTITIES UNDER RULE 29.6

All parties to the proceedings below in the United States Court of Appeals for the Fourth Circuit appear in the caption for the case and are the only interested parties.

There are no parties which are public corporations having publicly traded stocks, nor parent, subsidiary or affiliate corporations to list pursuant to Rule 29.6

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED . . .	i
LIST OF PARTIES TO THE PROCEEDINGS UNDER RULE 14.1(b) AND ENTITLES UNDER RULE 29.1	iii
TABLE OF CONTENTS	iv
TABLE OF CITATIONS	vi
OPINIONS BELOW	1
STATEMENT OF JURISDICTION . .	1
CONSTITUTION, RULE, AND STATUTORY PROVISIONS INVOLVED.	3
STATEMENT OF THE CASE . . .	3
REASONS FOR GRANTING THE WRIT .	15
I. THE RESPONDENTS VIOLATED CLEARLY ESTABLISHED CONSTITUTIONAL LAW, THAT ANY REASONABLY TRAINED OFFICER AND ATTORNEY WOULD AND SHOULD KNOW	15
II. WHEN, AS HERE, THE DISTRICT COURT, AFTER DISCOVERY, AND REVIEW OF VOLUMINOUS EXHIBITS	

AND PORTIONS OF DEPOSITIONS, AFFIDAVITS, AND EXHIBITS, FACTUALLY DETERMINES THAT GENUINE ISSUES AS TO MATERIAL FACTS EXISTED WHICH PRECLUDED SUMMARY JUDGMENT, IT WAS ERROR FOR THE CIRCUIT COURT TO ENTERTAIN THE ISSUE ON APPEAL MUCH LESS SUMMARILY REVERSE THE TRIAL COURT 21

III. THE WARRANTS AND SEIZURES WERE CONSTITUTIONALLY PROHIBITED PRIOR RESTRAINTS, OF FIRST AMENDMENT RIGHTS UNDER ESTABLISHED LAW 24

CONCLUSION 27

TABLE OF AUTHORITIES

Cases

	Page
Adickes v. S.H. Kress & Co., 398 US 144	23,28
Anderson v. Liberty Lobby, 472 US 242	23,28
Adler v. Pomerleau, 313 F. Supp. 277	6
Bantam Books v. Sullivan, 327 US 58	4,12
Blount v. Rizzi, 352 US 496	20
Brockett v. Spokane Arcades, 472 US 491	27
Butler v. Michigan, 352 US 380	26
Cantwell v. Conn., 310 US 296	26
Chesapeake B&M, Inc. v. Cassilly, 729 F. Supp. 1106	10
Consolidated Ed. Co. v. P.S.C., 447 US 530	26
Denver Area Ed. Telecommmunications Consortium, Inc. v. F.C.C., 518 US ___	27
Edenfield v. Fane, 507 US 761	26
Erznozniak v. Jacksonville, 422 US 205	26

Ft. Wayne Books v. Indiana, 489 US 46 . 19,20,25,28

Heller v. New York, 413 US 483 . . . 12,20,28

Johnson v. Jones, 515 US 304, 115 Ct 2151 . 22,24,28

Kennedy v. Silas & Mason Co., 344 US 249 . 23

Lee Art Theaters v. Virginia, 392 US 636 . 19,25

Lo-Ji Sales v. New York, 442 US 319 . . 20

Lujan v. National Wildlife Fed., 479 US 871 . 22

Malley v. Briggs, 475 US 335 . . . 13

Marcus v. Search Warrants, 367 US 717 . 12,19,20,25

Marquis v. State, 289 A2d 408 . . . 24,25

Miller v. California, 413 US 15 . . 4,21,26,28

Mitchell v. Forsyth, 472 US 511 . . . 2,10

Pope v. Illinois, 481 US 497, 500 . . . 27

Quantity of Books v. Kansas, 378 US 205 1964 . 12,20,25

R.A.V. v. City of St. Paul, 505 US 377 . . 21,26

Randall Books I v. State, 452 A2d 187 . . 4,17

Randall Books II. v. State, 497 A2d 1174 .4,5,6,12,7

Reno v. American Civil Liberties Union,
___ US ___, 117 S. Ct. 2329 . . . 27

Roaden v. Kentucky, 413 US 496 . . . 19,20

Roth v. U.S., 354 US 487 26,28

Rubin v. Coors Brewery, 574 US ___, 115 S.Ct. 1585 26

Sable Com. of Calif. Inc. v. F.C.C. . . 27

Simon & Schuster v. N.Y. Crime Vict. Bd., 502 US 105 26

Smiley v. State, 450 A2d 909 . . . 3,5,6,10,17

Stanford v. Texas, 379 US 476 . . . 19,20,25

Turner v. Dammon, 848 F2d 440 . . . 22

Turner Broadcasting v. F.C.C., 512 US 622 . 26

U.S. v. Leon, 468 US 897 4

Virginia v. American Book Sellers, Inc., 484 US 636 27

Younger v. Harris, 401 US 37 . . . 16

Statutes Cited

Federal: 28, U.S.C., Sect. 1254 . . 2
Sect. 1291 . . 2
Sect. 1331 . . 2
Sect. 1343 . . 2
Sect. 1367 . . 2

Sect. 2201 . . 2

42, U.S.C., Sect. 1983 . . 2
Sect. 1988 . . 2
Maryland Art. 27, Sect. 416A . .3,8,17,18
Sect. 416D . .3,6,7,25,26
Sect. 418A . . 3,8,24

Constitutinal Provisions Cited

First Amend. 3,4,11,19,20

Fourth Amend. 3

Fourteenth Amend. 3

F.R.C.P. 56 3

APPENDIX

Appendix A -Order of Court of Appeals amending opinion on August 24, 1998 . 1a

Appendix B- Unpublished Amended Opinion of Court of Appeals 3a

Appendix C- Order of Court of Appeals denying Petition for Re-Hearing dated September 14, 1998 . . . 17a

Appendix D- District Court Opinion and Order entered July 24, 1997 . . 20a

Appendix E- Constitutional Provisions . 53a

Petitioners Joseph J. LaVodie Successor Director/Trustee for 3011 Corporate, t/a U.S. Books and L.R. News, Inc., t/a Edgewood Books respectfully pray that a Writ of Certiorari be issued to review the per curiam unpublished amended judgment and opinion of the United States Court of Appeals for the Fourth Circuit issued in the above proceeding August 24, 1998.

OPINIONS BELOW

The amended per curiam opinion of the Court of Appeals reversing the decision of the District Court and directing the District Court to grant summary judgment to all three Respondents here upon the grounds of qualified immunity was entered August 24, 1998 is unpublished and is reproduced in the Appendix as Appendix A. The Court of Appeals Order denying the Petition For Rehearing and suggestion for rehearing in banc entered September 14, 1998 (Appendix B) is not reported.

The District Court Opinion and Order denying each of the Respondents motion for summary judgment sought on the basis of "qualified immunity", because the District Court found that there existed substantial disputes as to material facts precluding summary judgment upon the particular claims at issue is reported, Hicks, et al v. CASSILLY, et al., 971 F. Supp. 956, and at Appendix C

STATEMENT OF JURISDICTION

The amended opinion of the Court of Appeals was entered on August 24, 1998 (App. A). The Petition For Rehearing and suggestion for rehearing in banc was denied September 14, 1998 (App B). The decision and judgment below concerning qualified immunity was thus final.

This Court's jurisdiction is invoked under 28, U.S.C., Sect. 1254 (a) and Supreme Court Rule 13.

Jurisdiction of the Court of Appeals to review denial of Summary Judgment on the basis of qualified immunity was invoked under 28, U.S.C., Sect. 1291 and Mitchell v. Forsyth, 472 U.S. 511 (1985). Jurisdiction of the District Court was invoked under 28, U.S.C., Sect. 1331, 1343 (a)(3) and (4) and 2201 as well as 42, U.S.C., Sect. 1983, 1988. Supplemental Jurisdiction for State law claims was invoked under 28, U.S.C., Sect. 1367(a).

CONSTITUTION, RULE AND STATUTORY PROVISIONS INVOLVED

The relevant portions of the First, Fourth and Fourteenth Amendments, F.R.C.P. 56, and Maryland Code, Article 27, Sect. 416A and 416D are reproduced in the Appendix.

STATEMENT OF THE CASE

Joseph I. Cassilly (Cassilly) is the States Attorney and chief criminal prosecutor for Harford County whose duties entail representing the State in Court in all criminal prosecutions for offenses occurring in Harford County. M. Teresa Garland (Garland) is an Assistant States Attorney and a prosecutor under Cassilly. J. R. Taylor (Taylor) is a Deputy Sheriff in Harford County and acted under the Sheriff Dominic J. Mele and they are the principle law enforcement officials for Harford County, Maryland. Petitioner Joseph J. LaVodie is the newly elected Successor Director/Trustee of 3011 Corporation t/a "U.S. Books" taking over that corporate office from Larry C. Hicks shortly before the Circuit Court decision below and has filed entry of appearance in the District Court. L.R. News, Inc., t/a "Edgewood Books" is the other Petitioner here.

The Maryland legislature previously enacted Article 27, Sections 416A through 416D and 418A as part of its criminal code which is the relevant operative statute here. (App. E).

The Maryland Court of Appeals in the decision Smiley v. State, 450 A2 909 (1982) a criminal appeal determined that, although those statutes did not facially require the depictions, portrayals, sculptures, and description

narratives, illegal to display to be obscene, and thus invalid under the First Amendment and Miller v. California, 413 U.S. 15, because of legislative intent it would construed the statute to require that they be constitutionally obscene under Miller.

As a result of seizures engaged in and criminal charges filed against video and book stores in Baltimore County, under this statute before the Smiley decision, the state appealed to Maryland's Intermediate appellate court a separate matter entitled Randall Books v. State, 452 A2d 187 (Randall I.). Since, during the interim, Smiley had now been decided, the Randall court, although also agreeing the statutes facial terms would permit the seizure and prosecution even of a "crucifix", reversed the Trial Court dismissal and remanded on the basis of Smiley

After trial on remand another appeal presented the "good faith Leon issue (U.S. v. Leon, 468 U.S. 897) as to failure of the search warrant to allege the items to be seized were "obscene" reported as Randall Books v. State, 497 A2d 1174 (Randall II). Randall II held that it was constitutionally invalid to issue a warrant and an indictment, in which the affidavits fail to allege the materials to be obscene and to provide probable cause facts supporting that element for issuance of the search warrant. But in that case the officers did not have the subsequent ruling in Smiley and consequently were deemed to be acting in good faith since they did not have the Smiley decision to guide them. Randall II was decided in 1985. A third and final decision in Randall came on June 7, 1989 reported at, 558 A2d 717.

On November 1, 1988 in conduct reminiscent of that rejected Bantam Books v. Sullivan, 327 U.S. 58 Sheriff Mele,

with concurrence of Respondent Cassilly, authored a letter and had it hand delivered by his Deputies to all video stores, newsstands, and book outlets in Harford County in which they warned inter alia that video cassettes and their boxes "on display in a commercial establishment which depict sexual acts/conduct are a violation of the nudity and sexual display laws" and urging removal of such displayed items as violating that display and the obscenity laws. A copy of that letter was delivered to both 3011 Corporation represented here by Joseph LaVodie Successor corporate Director/Trustee and by L.R. News, Inc.

In 1989 after Randall II Cassilly arranged for himself and two other Sheriff's Office personnel to meet with prosecutors of the Baltimore County State's Attorney's Office and officers of that Police Department who had conducted those prior investigations, searches and seizures and Court litigation of the above Randall Bookstore cases.

Cassilly obtained copies of the Randall affidavits and search warrants and applications which had been previously ruled constitutionally invalid in Randall as contrary to the Smiley decision, and the cited Supreme Court cases. Cassilly thereafter met several times with Taylor concerning preparation of search and seizure measures and the criminal investigations against the two stores here with two other stores in Harford County. Although aware of the Smiley, Randall Books, and the cited Supreme Court rulings, he decided to pattern their warrant applications and affidavits after the invalid Baltimore County documents involved in Randall Books which omitted all claims and facts that the items to be seized were obscene. He along with Taylor and Garland admitted below they did not believe the Smiley decision concerning Miller requirements that non-obscene sexual portrayals could not be criminalized because

viewable on the exterior of speech works they considered as advertising matter when on display to adult customers. Cassilly disagreed with the Maryland Court of Appeals decision in Smiley incorporating "obscenity" into Art. 27, Sect. 416D as an essential element. He and Taylor intentionally only relied thereafter upon the content depictions displayed rejecting any claim the covers were obscene for seizure or prosecution. Taylor admitted he read the above statute which, under Maryland law, is an Annotated Code and included the rulings in Smiley, Randall and Adler v. Pomerleau 313 F. Supp. 277 (D.MD.) and other adversary hearing cases.

On May 25, 1989, Taylor entered 3011 Corp. t/a "U.S. Books" and purchased two magazines entitled "She-Male Superstar" and "She-Male In Control" and at L.R. News, Inc. t/a Edgewood Books he purchased "Transvestite" and "Asses In Bondage".

Taylor then prepared affidavits for search warrants in which he referred to all other items, he allegedly observed in each store, by merely alleging that "The magazines and films, which are displayed on shelves and wall racks, exemplifies the sexual spectrum of heterosexuality, homosexuality, lesbianism and sadomasochism". Taylor did not alleged that any such depiction or description on any item, whether a purchased or displayed item, sought to be seized, was obscene or otherwise seizable constitutionally.

On June 9, 1989, Defendant Taylor with the black and white photocopies of the front and rear covers of the purchased magazines attached to each of his affidavits and applications for a search and seizure warrant and presented them to Judge Cypert O. Whitfill with his proposed search

warrant he also prepared after consulting in this undertaking by Cassilly.

The application and prepared search warrant did not allege any item sought to be seized was obscene and no speech work was identified, titled, or for identification particularly described, the prepared warrant was worded to authorize the search for and the seizure of and removal of all materials he determined were displayed for advertising purposes containing the stated statutorily listed sexually oriented depictions on their front covers.

Taylor had Judge Whitfill issue those two prepared search warrants containing directions for the seizure of all copies of all items, in the form Taylor prepared, along with similar search warrants for two other bookstores in that County. These prepared warrants themselves when issued did not state that probable cause of obscenity had been found by the issuing Judge. They did not particularly describe any item the warrants permitted to be seized leaving to Taylor and the executing officers the discretion for determination, by them during execution, of what films and publications were seizable as exposing a depiction in violation of Art. 27, Sect. 416D.

On June 13, 1989 the search warrants were executed at 3011 Corp. and L.R. News bookstores with Taylor being the executing officer at 3011 Corp. After the premises was secure and the warrant already served, Cassilly and Garland entered U.S. Books and assisted the officers and commenced undertaking an advisory and voluntary role inside the store to resolve as to what should be seized. Thus Cassilly and Garland became individual criminal investigators and part of the seizing team and not prosecutors exercising any of their State in Court

discretionary prosecutorial functions.

Seized as a consequence at 3011 Corp. were 1,130 magazines, videotapes, video tape boxes, novels, newspapers, publications and other items while some 765 such items were seized from L. R. News, Inc. In both stores when a particular speech work was determined to be seized, because of exterior sexual depictions, the executing officers determined were in violation of Art. 27, Sect. 416A and 416D then all other copies of it were likewise seized including those speech works held in stock behind the counter, and not on display. Virtually all speech materials in both stores were seized and the businesses were closed. During the search 12 patrons, 1 contract repair personnel, and 3 employees were seized, searched and identified by the officers. No arrests were made.

On June 26, 1989 letters from counsel for the stores was hand delivered to Mele, Taylor, and Cassilly. Those letters notified the Sheriff Taylor, and States Attorney that, since the seizures, the stores were prevented from all further dissemination of those items and they demanded the conduct of an adversary hearing, on the obscenity and continuing suppression, of the mass seized items and complaining they were seized without judicially proper warrant authorization. No such adversary hearing was conducted as demanded and no criminal charges were then brought.

On July 18, 1989 the stores, many employees and others, were served a civil complaint filed under Art. 27, Sect. 418A, by Cassilly ordering them to show Cause why all the seized items, as well as all other remaining materials subsequently observed at the stores, should not be seized, enjoined from dissemination, and confiscated and then

destroyed by the Sheriff.

The sole relief sought against the film and books was their destruction. It was docketed in the Circuit Court for Harford County as Civil Docket 13/13, No. 9007. The Show Cause Order was returnable August 14, 1989. A timely response by the stores and named individuals, that the items were not obscene, requesting a dismissal and the conduct of an adversary hearing under the cited Supreme Court decisions. No adversary hearing on obscenity was conducted as demanded at the Show Cause hearing on August 14, 1989 or anytime thereafter. Cassilly let his civil complaint lie until it was subsequently dismissed by him immediately prior to scheduled trial on the merits the following year. Thereafter Cassilly filed criminal charges against a corporate officer and that pending criminal trial and appeal, of Hicks individually, barred the store's right to get the materials returned as under Maryland law they were evidence in Hicks trial.

After Cassilly filed his civil complaint and refused to return the speech works to permit dissemination or conduct the demanded adversary hearing under Heller, infra the Petitioners, employees, and several customers subjected to the searches, filed the present civil rights complaint below docketed as No. CIV. B-89-2231.

A stay was entered of all proceedings by the District Court in March, 1990 due to those later filed state criminal proceedings against a individual and the two stores, which stay was not lifted until they were concluded by appellate dismissal of all criminal charges against the individual and Cassilly's subsequent dismissal of all charges against these stores, without any valid conviction, in July, 1994.

A consent order settlement of a third adult bookstore civil rights complaint against Cassilly, et al arising out of a similar mass search and seizure on the same date was filed before Chief Judge Black in the trial court below based upon his ruling on identical affidavits, warrants, and seizures in Chesapeake B&M, Inc. v. Cassilly, et al, 792 F. Supp. 1109, that in the future no mass seizures without prior adversary hearing would be conducted by the States Attorney and Sheriff's Office. The Respondents on March 22, 1990 (over 9 months after the seizures) returned all but somewhat more than 100 of the seized works at each of these bookstores (some 200 plus items) to conform to that order and the Trial Court's initial T.R.O. hearing oral discussion by the Trial Court concerning the massive amount seized and ruling in that case. The remaining over 200 seized items were kept as evidence of the newly filed criminal charges. However all State civil and criminal charges were concluded by either reversal and dismissal on appeal without remand, or by dismissal years later prior to lifting of the Trial Court's stay on August 1, 1994. The Respondents here still have not returned the remaining 100 items from each bookstore. Those items previously returned were substantially damaged and marked with magic markers as numbered evidence and were so stale as to date that very little value was left for dissemination of them.

Cross Motions for Summary Judgment with exhibits and deposition testimony were separately submitted here by Taylor and Cassilly with Garland, and by the two bookstores.

The District Court denied the request by Taylor for qualified immunity under Mitchell v. Forsyth as to Counts One, Four and Five. Taylor then only appealed the Court's denial of qualified immunity as to Counts One and Five, leaving Count Four for future trial below.

The District Court also denied the request by Cassilly for qualified immunity under Count One and for both Cassilly and Garland for Count Five. They appealed those rulings.

The District Court first factually determined that the search warrants and the affidavits for seizures, presented to the Court for signature and issuance was for a prohibited mass seizure of "all" such speech works by the executing officers under their determinations of them to be illegally displayed and that they depict "sadomasochistic abuse", "sexual conduct", or "sexual excitement" "apparently vesting within the executing officers the authority to determine which materials were obscene, and thus seizable, under the statute as interpreted in Smiley v. State, 294 MD. 461" (1982) (J.A. 525). The warrants never included the items to be seized as "obscene items" but simply for their content of sexual depictions. The District Judge in his decision in Footnote No. 8 stated that due to the ruling to not grant summary judgment to Taylor and Cassilly, and proceed to full trial, the Court did not reach nor rule upon Petitioners' claims against the facial constitutionality of the search warrants themselves for failure to find and require the works to be seized to be obscene. Thus this issue remains for resolution below and directly affects the essence of the Circuit Courts ruling for review here.

As to Taylor and Cassilly, under Count One, the District Court determined the issue to be first whether the warrants were facially and factually deficient for permitting the officers to seize "all" books and works on display, without regard to the dictates of the Supreme concerning prior restraint of First Amendment rights.

The Trial Court first considered whether the above

constitutional search and seizure right of the stores searched by Taylor, Garland, and Cassilly was clearly established. It held that under this Court's decisions in Marcus v. Search Warrants, 367 US 717 (1961), Quantity of Books v. Kansas, 378 US 205 (1964) mass seizures of numerous or all copies of speech works, without prior adversary hearings, were prohibited as violative of the First and Fourteenth Amendments also citing Bantam Books v. Sullivan, 372 US 58. It also held that this constitutional deficiency could not be cured by an adversary hearing held at some point after seizure. That stated constitutional stricture is also found under Randall Books v. State, supra and Smiley v. State, supra but was left to the side and not cited.

The Trial Court then considered the decision of Heller v. New York, 413 US 483 (1973) which differentiated between the seizure of a single copy of a film for bona fide preservation of it as evidence and that of seizing films to destroy them or block their distribution or exhibition.

From this the District Court held that those cited decisions clearly establish the right of an adversarial hearing prior to this mass seizure of speech works.

The Court then considered whether in light of that clearly established law, Cassilly and Taylor acted reasonably in submitting the warrant application with their prepared warrant that facially requested seizure of "all" items that the executing officers during execution determined allegedly violated Section 416D. The District Court determined that the Court had rejected this same absolutist assertion and specifically ruled that the appropriate inquiry was "whether a reasonably well-trained officer in this officers position would have, or should have, known that his affidavit facially failed to establish probable cause and that he should not

have applied for the facially deficient warrant, Malley v. Briggs, 475 US 335, 345-346.

The Court held that no per se rule was involved based upon issuance of the warrant and, a finding of qualified immunity depends upon whether the Defendants actions were reasonable. As highly fact specific it was determined to be properly reserved for trial. In doing so it also held that the Plaintiffs companion claims that the warrants were deficient because they did not require them to be obscene and did not leave the obscenity determination to a neutral and detached judicial official as constitutionally mandated would not be reached, since the primary issue was reserved for trial resolution on the disputed material facts.

Equally as important is the District Curt's holding in footnote 10 in which the Court referred to Plaintiffs' motion for summary judgment as addressing many of the same issues. The Court as to both sides claims stated "As to those claims where summary judgment has been denied, the Court has found disputes of material fact preventing summary judgment for either party". The Court factually found genuine disputes of material fact existed and thus the basis for denying both Plaintiffs and Defendants motions for summary judgment.

On appeal the Circuit Court, in its per curiam unpublished opinion, contrary to the allegations of the complaint never considered that the affidavit and the warrant failed to facially allege the speech works sought to be seized were "obscene". Therefore the very basis of the Circuit's foundation facts were not accurate upon which to build its ruling.

Petitioners on appeal made the claim that there existed genuine issues involving material facts found by the Trial Court preventing summary judgment as a matte of law upon qualified immunity claims pending further proceeding the District Court. Yet the Circuit Court, without mentioning or considering the disputed facts or the trial court ruling, proceeded to rule upon the appropriateness of qualified immunity.

The Circuit Court incorrectly determined that the law was established that even the described mass seizure of obscene materials for the bona fide purpose of using them as evidence was permissible without an adversary hearing. The panel differentiated the conduct they perceived as unconstitutional, in applying for a warrant to conduct a mass seizure of expression materials, "with the purpose of taking that material out of circulation or display against applying for the same warrant allowing the mass seizure for the purpose of preserving them for evidence in a subsequent trial, and held the later did not require a prior adversary hearing and Respondents conduct was constitutional.

To further support that determination the panel then erroneously held, that since Cassilly filed a civil seizure condemnation and destruction complaint a month after the seizure in which a Show Cause Order issued under state rules of court, that this was somehow evidence Cassilly would afford an adversary hearing as to obscenity of the works. The panel never commented upon the fact that such a hearing was demanded in writing right after the seizure and again in response to the Show Cause Order a month later and by motion in the criminal courts. Neither Cassilly nor the state court conducted one. In fact Cassilly let his civil suit and adversary hearing demand lie until that civil trial on the merits was to begin and he then similarly

dismissed his civil destruction suit precluding the hearing rather than go to trial. No adversary hearing was ever conducted for Petitioners below.

Following the above rulings the Circuit Court reversed the trial court and ordered the trial court to enter summary judgment in favor of each of these Respondents on all the counts appealed on the basis of qualified immunity.

REASONS FOR GRANTING THE WRIT

I.
THE RESPONDENTS VIOLATED CLEARLY ESTABLISHED CONSTITUTIONAL LAW, THAT ANY REASONABLY TRAINED OFFICER AND ATTORNEY WOULD AND SHOULD KNOW

During execution the officers at these two stores sealed off the bookstores and methodically forced closure of the on going film exhibition in the theater at 3011 Corp. and all the individual viewing booths and took all the customers and film viewing audience (at least 10-15 people) out to the book and film sales area. They spread eagled these patrons and some employees against the sales counters and searched them as well as questioned them and seized their identification, after which they held them in custody during the time a check of criminal and warrant files were made of each of them. When later released all were precluded from taking any speech selections with them. The search warrant contained no directions or authority to search or seize customers, clerks or employees. It only authorized the seizure of expression works and only where displayed to patrons for their selection.

The officers also seized and searched three (3)

persons outside the rear of the building then taking them into custody and compelled them to enter the store in custody and again spread eagled and again searched and held as above.

One African-American customer already searched twice previously was forced to move to the wall near the front door where an additional search of him was staged for late arriving television cameras filming and newspaper photo. No one was arrested or removed in custody during or following completion of the search.

These films and photos appeared repeatedly on the major television news programs and newspapers showing the patrons and employees and the staged photo up conduct of the African American customer being searched.

Both companies, three (3) employees (one, LaVodie, talking to another person on the rear parking lot and was off from work at the time) two persons doing contract maintenance work who were on the outside, and two of the customers (including the African-American who had been repeatedly searched and filmed) filed suit under 42 USC 1983, 1988 containing six (6) counts. Suit including the customers here was stayed by an abstention Order of the Trial Court below until 8/19/94, or for some 5 years after the search, due to various state court proceedings on the basis of Younger v. Harris, 401 US 37 until they ended.

3011 Corp. And L.R. News, Inc. In June 1989 operated bookstores in Harford County, Maryland when they were subjected to the execution of the search warrants at issue which facially authorized police to;

"B. Seize and remove all books, magazines,

photographs, films, posters, and other items or materials[1] that are displayed for advertising purposes which depict sadomasochistic abuse, sexual conduct, and Sexual excitement."[2]

It is equally important that Taylor's Search Warrant Affidavit and Application and the Taylor prepared Search Warrant on their face did not claim that any speech work on display and to be seized was "obscene." In fact the word "obscene" itself never appeared anywhere in either document. This omission was intentionally done and admitted by all three appellants so as to avoid obscenity trials by using the facial wording of Art. 27, Sect. 416A and 416D advertising claims upon the speech displays and ignoring the construction in Smiley involving the required "obscenity" element. Because the cover of a publication contained a statutorily prohibited portrayal the cover was claimed to be separate from the publication and treated as adversary matter contrary to Miller.

The application and affidavit described the speech works observed in the bookstores merely as;

"The retail section of the store consists of

---

[1] Not one of the speech works to have all copies seized were identified or particularly described to limit the executing officers discretion to seize.

[2] The warrant also included the terms definitions as set out in the Code Sect. 416 A. Those definitions were found to facially include even a crucifix. See Smiley and Randall Books. It is set out in the Code Chapter titled "Nudity and Sexual Displays"

magazines, films, Rubber sexual aids, and novelties. The magazines and films, which are displayed on shelves and wall racks, exemplifies the sexual spectrum of heterosexuality, homosexuality, lesbianism, and sadomasochism."[3]

None of the depictions (pictorial) and descriptions (literary) were required to be obscene on the face of the

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[3] None of those terms appear in 416A but only the following: "Sadomasochistic abuse" even includes merely torture (or even flagellation) being committed by someone who simply dresses themselves in a revealing costume or a bizarre costume or alternatively while nude or wearing undergarments although the victim can be fully clothed. In the alternative it also applies to the situation where someone even fully dressed and in street clothing merely engages in torturing another who is dressed in either the revealing or bizarre costume or wearing undergarments as well as in the nude. In fact it also includes the condition of a single person so clothed while physically restrained or being fettered or being bound while fully clothed.

"Sexual conduct" similarly is defined over broadly to include a fully clothed individuals having mere contact with or any touching of their own body, buttocks, public areas, or genitals as well as a female breast or by others of the same or opposite sex.

"Sexual excitement" similarly and over broadly encompasses the conditions of a fully clothed female breast in a state of sexual stimulation as well as a human male or female genitals and extending it even to sensual experiences of humans engaging in or witnessing sexual conduct or nudity.

statute to be criminal to display them in a bookstore. That is the very reason the statute was initially declared unconstitutional upon its face as permitting criminal prosecution even for display of a "crucifix" Randall Books, Inc. I. V. State, 452 A2d 187. See Smiley v. State, 450 A2d 909 and Randall Books, Inc. II. V. State, 497 A2d 1174. From the Smiley construction of the statute it was judicially read to criminalize only obscene depictions and descriptions on display for advertising purposes. Hence both the affidavit and application and the warrant itself following Smiley was compelled by Maryland law to allege them as "obscene" depictions and obscene descriptions. See Randall Books, Inc. II., supra.

The affidavit and warrant at issue here however intentionally failed to even identify or particularly describe or name by title, volume, or issue any particular speech works the warrant authorized to be seized by the executing officer when issued by the judge contrary to Marcus v. Search Warrants, 367 US 717, Quantity of Books v. Kansas, 378 US 205, Stanford v. Texas, 379 US 476, and Ft. Wayne Books v. Indiana, 489 US 46. There were no adequate probable cause facts presented to the issuing officer of any particular work or of the content on their face or otherwise, for the judicial officer to determine in the first instance that there was factually adequate probable cause that any particular speech work was unprotected speech and/or probably obscene, taken as a whole, contrary to those decisions. Even had Taylor actually claimed any speech work, to be obscene, the warrant, in the absence of such facts, was still unconstitutionally issued to seize presumptively protected First Amendment materials solely upon the determination and affidavit of this police officer in direct contravention of this Court's holdings of, Lee Art Theaters v. Virginia, 392 US 636, Roaden v. Kentucky, 413

US 496, Ft. Wayne Books, and Stanford. It was further facially invalid in the absence of a neutral and independent judicial finding in the warrants of each works obscenity and probable cause finding therefore and of that work's seizability upon that basis. Lo-Ji Sales v. New York, 442 US 319, Blount v. Rizzi, 352 US 380. Similarly it was violative of established Maryland law as set out in Smiley, Randall I, and Randall II and could not have provided any basis of qualified immunity contrary to such established law.

The panel in their decision (slip. op. 8) do not mention these constitutional defects nor do they note that every copy of each seized item was also seized leaving none for dissemination. They also did not even consider the disapproval in Heller of such mass seizures.

The warrant itself, was therefore facially unconstitutional in overbreadth and vagueness of its authority in permissible execution for police officer seizures and suppression of speech works at its targeted premises. It directed the executing officers to seize all copies as a judicially directed warrant authorized mass seizure of any and all the unidentified speech works those executing officers decided to seize, imposing a total constitutionally prohibited "prior restraint" upon those works contrary to Heller v. New York, 413 US 483, Roaden (seizure of a film terminates exhibition) Marcus, Quantity of Books, Lo-Ji Sales, and Blount v. Rizzi, 352 US 380. It unconstitutionally facially authorized the executing officers to act as prohibited police censors of speech works contrary to the First Amendment, and Marcus, Quantity of Books supra. The panel apparently either misapprehended the relevant facts presented and the law applicable as presented them by Petitioners here.

Finally, the affidavit, application, and warrant wrongfully treated and equated all the stores presumptively protected speech works as illegal contraband, based upon the content of the speech and sought to make protected speech works subject to summary seizure. All without the required obscenity element in direct contravention of Randall Books II. The panel apparently overlooked the point of law that speech works are presumptively protected matter under the First Amendment barring their seizure as contraband and suppression of them, as occurred here, absent the probable cause facts showing that a specified speech work is obscene. See R.A.V. v. City of St. Paul, 505 U.S. 377, Miller v. California, 413 U.S. 15. The panel also apparently misapprehended the Supreme Court holdings in determining they allow mass seizure so long as it is done for use as evidence.

The panels conclusory statement (slip op. Pp. 8) that Cassilly's whole purpose for the seizure(s) under the warrant was to "obtain evidence for use at a criminal trial", is factually inaccurate and against the admissions in the record, as shown not only by Cassilly, but by Garland and Taylor. They intentionally did not seize them on the basis of being obscene in order to completely avoid criminal obscenity trials, which, they openly admitted and believed, would not be fruitful in closing the stores as they stated openly to the press that the planned seizure of all the goods and subsequent injunctions would.

II.
WHEN, AS HERE, THE DISTRICT COURT, AFTER DISCOVERY, AND REVIEW OF VOLUMINOUS EXHIBITS AND PORTIONS OF DEPOSITIONS, AFFIDAVITS, AND EXHIBITS, FACTUALLY DETERMINES THAT GENUINE DISPUTES

AS TO MATERIAL FACTS EXISTED WHICH PRECLUDED SUMMARY JUDGMENT, IT WAS ERROR FOR THE CIRCUIT COURT TO ENTERTAIN THE ISSUE ON APPEAL MUCH LESS SUMMARILY REVERSE THE TRIAL COURT

The District court had denied summary judgment on the present issues solely because it had found that genuine issues of material fact presently existed, after initial discovery, precluding entry of summary judgment by that Court. In the face of such a finding the Defendants appealed and the panel reversed without resolving such disputed facts. Where a trial court finds genuine disputes of material facts exist it precludes entry of summary judgment by that Court. In the face of such a finding the Respondents appealed and the panel reversed without resolving such disputed1 facts issue. Where a trial court finds genuine disputes of material facts exist, precluding summary judgment, even as to qualified immunity, the interim denial of summary judgment is "not a final decision" within the meaning of the appellate jurisdiction statute, Johnson v. Jones, 515 U.S. 304, 115 S.Ct. 2151, Turner v. Dammon, 848 F2d 444 (A4).

Because the Defendants (Respondents here) presented their motion for summary judgment seeking dismissal of the particular claims appealed to the Circuit on the basis of qualified immunity F.R.C.P., 56 it compels this court and the Circuit Court below to construe the facts in favor of Petitioners and against the movant. It can only be granted if there is no dispute as to any material fact and the movant is entitled to judgment as a matter of law. Lujan v. National Wildlife Fed., 497 US 871.

In fact it is not appropriate unless viewing the

possible inferences in a light most favorable to the non-moving party, no reasonable jury could return a verdict in favor of the non-moving party. Anderson v. Lobby Inc., 477 U.S. 242. And the evidence of the Petitioners are to be believed Adicks v. S.H. Kress & Co., 398 U.S. 144, Anderson at 355. It is equally appropriate when, as here, the Court below had and stated its reason to believe the better course would be to proceed to trial. Anderson at 255 citing Kennedy v. Silas v. Mason Co., 344 U.S. 249.

The Circuit Court panel related alleged facts concerning the conduct below which is either not supported by the facts or otherwise found in the record. They are contradicted by Petitioner's complaint with attached exhibits and accompanying affidavits as well as motion exhibits of sworn testimony showing in many respects and in particular Cassilly's intent not to obey the constitutional rule to hold an adversary hearing. The Circuit panel concluded it flowed from the Show Cause Order. The actual facts presented relied upon by Petitioner's revealed Cassilly receiving the stores written demand (1) ignored it, (2) t the Show Cause hearing provided only oral argument for Cassilly to be given an order to return to the stores and seize all other materials at the businesses they deemed under their interpretation of the code, (3) refused to conduct that hearing even when presented the second demand in the civil proceeding, (4) failed to even conduct the civil trial on the merits the following year immediately before which they dismissed the civil suit entirely and then filed some 200 criminal counts two separate times and before trial. He dismissed all of those without a hearing some several years later. To date no such hearing has been offered much less conducted for Petitioners upon the constitutional protection vel non of any of Petitioner's speech works. Yet they still have more than 200 such speech works years after all state

proceedings have been dismissed.

Cassilly's civil complaint was founded upon Art. 27, Sect. 418A which only permits the seizure and destruction of obscene materials and will not permit them after the complaint is heard to be used as evidence in a subsequent criminal proceeding. See Marquis v. State of Maryland, 289 A2d 408.

Finally the decision below erred in stating that the Petitioners failed to produce any material evidence the warrants were intended for any purpose other than to preserve evidence for a criminal trial. The civil rights complaint and exhibits as well as the Defendants admissions at discovery and provided the trial court is direct evidence that Cassilly, Garland, and Taylor studiously avoided claiming the works were obscene due to the required trial and proof and the resulting multiple trials. To avoid that they admitted the seizures and civil suit was to close the stores entirely and avoid lengthy adversarial criminal proceedings under both federal and state constitutional decisions. Apparently the Circuit Court panel did not examine the entire trial court record when coming to their conclusions.

In any event the Circuit Court erred when it substituted its judgment on appeal for that of the trial court in contravention of this Court's holding in Johnson v. Jones, supra.

III.

THE WARRANTS AND SEIZURES WERE CONSTITUTIONALLY PROHIBITED PRIOR RESTRAINTS, OF FIRST AMENDMENT

They also incorrectly noted that Hicks does not dispute that if the "special rule" were not in the picture the warrants were supported by and could have been issued on probable cause. The panel must also have misapprehended the Appellees claims. The Appellees consistently dispute that the warrants were supported by probable cause. In fact neither the warrant nor the affidavit particularly described or identified any speech work and simply unconstitutionally under Fourth Amendment law left the decision as to what to seize up to the officers to be made when he executed the warrants contrary to Marcus, Quantity of Books, Roaden, See Art Theaters, Ft. Wayne Books, and Stanford v. Texas, 379 US 476.

From this the panel erroneously concluded that this Court's "special rule" did not preclude "bona fide" mass seizures intended to preserve those items for subsequent criminal trial, as this was permitted, while they deemed that only seizure for destruction or halting distribution of them, without such a hearing, was prohibited. That is a misreading of Heller single copy good faith seizures. Yet, here the seizure of all copies halted distribution. This, the opinion stated, was the law to the extent it was clearly established in June 1989. Appellees assert that such is not the law. The factual determination here is similarly disputed and when the civil suit was filed a criminal trial could not then be conducted by Maryland law, since Marquis v. State, 289 A2d 408. Marquis bars a criminal trial on seized evidence when that civil injunction and destruction trial is proceeding under Sect. 418A and even thereafter.

The opinion below sets out that Cassilly launched his investigation to find evidence of violation of Sect. 416D, a

criminal statute, determining that it would be alright to sell the expression works but it was a criminal violation to display that same work for sale or distribution under Sect. 416D. The exhibits to the federal complaint clearly show the intent was to avoid criminal trials as being too weak as he wanted to close the stores by seizures and injunctions using advertising displays as a vehicle. Of course this differential regulation of speech related activities requires heightened scrutiny Cantwell v. Conn., 310 US 296, 308, and when such regulation restrict speech dissemination based upon content or subject matter, Consolidated Ed. Co. v. P.S.C., 447 US 530, 536.

Respondents also erroneously claimed below that they can engage in such seizures and suppressions because the display of speech works to patrons in their stores is commercial speech activity. That notion totally misses the mark. See. R.A.V. v. City of St. Paul, 505 U.S. 377, Rubin v. Coors Brewery, 574 US , 115 S. Ct. 1585, Edenfield v. Fane, 507 US 761, Turner Broadcasting Inc. v. F.C.C., 512 US 622, Simon & Schuster v. N.Y. Crime Vict. Bd., 502 US 105. Thus even under the commercial speech claim Respondents actions could not survive.

These documents permitted the mass seizure of non obscene speech works on the basis of an isolated exterior depiction and description contrary to Miller v. California, 413 US 15. This has been prohibited since the Hicklin test was rejected long ago in Roth v. U.S., 354 US 487. They also however permitted the condemnation of non obscene sexual depictions and descriptions that are ordinarily lawfully displayed to adults, upon criteria only applicable to minors. All in contravention of adult First Amendment rights contrary to the Court's rulings in Butler v. Michigan, 352 US 380, Erznozniak v. Jacksonville, 422 US 205, Roth, supra, and

Virginia v. American Book Sellers, Inc., 484 US 636. Since the above conduct and prior to the panel decision below this Court's prohibition as above was reaffirmed in Reno v. American Civil Liberties Union, US , 117 S. Ct. 2329 (1997). Also citing Denver Area Ed. Telecommunications Consortium, Inc. v. F.C.C., 518 US , 116 S. Ct. 2374 (1996) Pope v. Illinois, 481 US 497, 500, Brockett v. Spokane Arcades, 472 US 491, and Sable Com. of Calif. Inc. v. F.C.C., 492 US 115 in support.

In sum, the Circuit panel decision failed to note and apply both established Maryland law and this Court's holdings invalidating the seizure and prosecution of speech works which are not alleged or factually shown to be probably obscene for adults. They also failed to note and apply this Court's applicable decisional law and procedural safeguards protecting presumptively protected First Amendment rights. Finally they failed to note, appreciate or rule upon the District Court findings of the existence of a genuine despite of material facts barring Summary Judgment.

CONCLUSION –

The Court of Appeals, in determining that each of the three Respondents were entitled to "qualified immunity" for their conduct, set out and relied upon factual determinations that were not accurate or which were contrary to the facts presented to the trial court and which were not presented by the parties or were incomplete from those in the trial court. Consequently the factual basis set out for finding Respondent Cassilly's intent to procure the materials as evidence for criminal prosecution was incorrect.

Similarly the Court of Appeals determination that

this Court's decision in Heller and Ft. Wayne Books condoned, constitutionally, mass seizures of every copy of large volume of speech works in an ongoing book and video store if the seizures were for later evidentiary use without consideration of the prior restraints imposed upon dissemination.

Because of this the Court below found that qualified immunity should have been granted without any reference to, and in direct conflict with, the trial court ruling that material facts were genuinely disputed and that Respondents were not entitled to summary judgment as a matter of law.

For this Petitioners urgently request this Honorable Court, in its supervisory role, to grant this Petition, reverse the decision below and reaffirm this Courts established constitutional rulings in the applicable decisions of Johnson v. Jones, 515 U.S. 304; Miller v. California, 413 U.S. 15; Heller v. New York, 413 U.S. 483; Anderson v. Liberty Lobby, 472 U.S. 242; Ft. Wayne Books v. Indiana, 489 U.S. 46; Adickes v. S.H. Kress & Co, 398 U.S. 205; and Roth v. United States, 354 U.S. 487 which were not adhered to by the Court below in rendering their decision.

This review is particularly important here because the Petitioners, their plaintiff customers and others have yet to be able to vindicate their First and Fourth Amendment rights and their civil rights claims over the last ten years since the search because of obstructions arising from applied comity principles, state trials, state appeals, and now this appellate review following discovery and lengthy trial level summary judgment proceedings.

Respectfully Submitted,

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(410) 821-6868
Counsel for Petitioners

APPENDIX

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1998

JOSEPH J. LAVODIE, Successor Director-Trustee
for 3011 Corporation, T/A U.S. Books; and
L.R. News, Inc., T/A Edgewood Books,
Petitioners,

vs.

JOSEPH I. CASSILLY, Individually and as
States Attorney, Harford County, Maryland;
M. TERESA GARLAND, Individually and
as Assistant State's Attorney, Harford County,
Maryland; and J.R. TAYLOR, Individually and
as Deputy Sheriff, Harford County, Maryland,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
For the Fourth Circuit

WILLIAM E. SEEKFORD, ESQ.
Counsel of Record
Attorney for Petitioner
Suite 1302, The Penthouse
28 Allegheny Avenue
Towson, Maryland 21204
(410) 821-6868

Filed: August 24, 1998

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 97-2206 (L)
(CA-89-2231-B)

Larry C. Hicks, etc., et al,

Plaintiffs-Appellees,

versus

Joseph I. Cassilly, etc., et al,

Defendants-Appellants.

O R D E R

The court amends is opinion filed July 27, 1998, as follows:

On page 11, first paragraph, line 3 -- the following footnote is added:

4 The district court also denied summary judgment

to Mary Teresa Garland, an Assistant State's Attorney in Cassilly's office. Garland did not participate in obtaining the search warrants, and there is no evidence suggesting that she had any role in Cassilly's decision to file a civil complaint after the warrants were executed. Accordingly, the district court is also instructed to enter summary judgment for Garland on qualified immunity grounds.

For the Court

/s/ Patricia S. Connor
Clerk

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Larry C. Hicks, Director-Trustee
for 3011 Corporation; L. R. News,
Incorporated, t/a Edgewood Books,
Plaintiffs-Appellees.

and

3011 Corporation, t/a US Books;
Joseph J. LaVodie; Patricia A.
Fulton; Paul Edward Koenig;
Patricia Ann McGinnis;
William L. Palmer, Jr.; William
Ensor; Edward E. Cage,
Plaintiffs, No. 97-2206

v.

Joseph I. Cassilly, Individually and
as States Attorney, Harford County,
Maryland; M. Teresa Garland,
Individually and as Assistant States
Attorney, Harford County, Maryland
Defendants-Appellants.

and

Robert Comes, in his official
capacity as Sheriff for Harford
County; Dominic J. Mele,
Individually; Jesse Bane; J. R.
Taylor; Thomas Golding; Roy

Mitchell; Michael Barlow; Fred Sherron; James Stonesifer; James M. Harkins; Edward Hopkins; Edward Keck; James Way, Individually and as Deputy Sheriffs, Harford County, Maryland; John Kutz; Al Hamlett, in their official capacities only as members of the Federal Bureau of Investigation, Bel Air Field Office; Bob Jones, in his official capacity only as U.S. Postal Inspector; John Philip, Incorporated; Raymond Astor,

Defendants.

Larry C. Hicks, Director-Trustee for 3011 Corporation; L. R. News, Incorporated, t/a Edgewood Books,

Plaintiffs-Appellees.

and

3011 Corporation, t/a US Books; Joseph J. LaVodie; Patricia A. Fulton; Paul Edward Koenig; Patricia Ann McGinnis; William L. Palmer, Jr.; William Ensor; Edward E. Cage,

Plaintiffs, No. 97-2206

v.

J. R. Taylor, Individually and as

Deputy Sheriff, Harford County, Maryland

Defendant-Appellant,

and

Joseph I. Cassilly, Individually and as States Attorney, Harford County, Maryland; M. Teresa Garland, Individually and as Assistant States Attorney, Harford County, Maryland; Robert Comes, in his official capacity as Sheriff for Harford County; Dominic J. Mele, Individually; Jesse Bane; Thomas Golding; Roy Mitchell; Michael Barlow; Fred Sherron; James Stonesifer; James M. Harkins; Edward Hopkins; Edward Keck; James Way, Individually and as Deputy Sheriffs, Harford County, Maryland; John Kutz; Al Hamlett, in their official capacities only as members of the Federal Bureau of Investigation, Bel Air Field Office; Bob Jones, in his official capacity only as U.S. Postal Inspector; John Philip, Incorporated; Raymond Astor,

Defendants.

Appeals from te United States District Court
for the District of Maryland, at Baltimore.
Walter E. Black, Jr., Senior District Judge.
(CA-89-2231-B)

Argued: May 7, 1998

Decided: July 27, 1998

Before MICHAEL and MOTZ, Circuit Judges, and FRIEDMAN, United States District Judge for the Eastern District of Virginia, Sitting by designation.

Reversed and remanded with instructions by unpublished per curiam opinion.

COUNSEL

ARGUED: Andrew Howard Baida, Assistant Attorney General, Baltimore, Maryland: Jefferson Lee Blomquist, Deputy County Attorney, DEPARTMENT OF LAW, Bel Air, Maryland, for Appellants. William Edward Seekford, Towson, Maryland, for Appellees. **ON BRIEF**: J. Joseph Curran, Jr., Attorney General of Maryland, Baltimore, Maryland, for Appellants Cassilly and Garland.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

The plaintiffs, two adult bookstores and their

owners and employees (collectively, Hicks[1]), sued under 42 U.S.C., Sect. 1983 because of allegedly unconstitutional searches of the premises of the bookstores. The searches resulted in the seizure of a large quantity of allegedly obscene materials. The searches were conducted pursuant to warrants obtained by Deputy Sheriff J.R. Taylor. The applications for the warrants were reviewed by Harford County (Maryland) State's Attorney, Joseph Cassilly. Hicks alleges that Taylor and Cassilly violated the United States Constitution by obtaining the warrants without first requesting a pre-seizure adversarial hearing. Taylor and Cassilly argue that they are entitled to qualified immunity because it was not clearly established of the time of the searches that a seizure of all obscene materials as evidence in as evidence in a criminal case required a pre-seizure adversarial hearing. The district court denied qualified immunity to Taylor and Cassilly on the ground that the warrants violated the constitutional requirement for a pre-seizure hearing. We find that Taylor and Cassilly did not violate clearly established law in applying for warrants to seize allegedly obscene material without a pre-seizure hearing. We therefore reverse the order of the district court and remand with instructions that Taylor and Cassilly be granted summary judgment on the grounds of qualified immunity.

I.

Early in 1989 the State's Attorney's Office of Harford County, Maryland, began an investigation of two

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[1] We refer to all of the plaintiffs as "Hicks" to simplify our writing. Hicks is actually plaintiff Larry C. Hicks, the Director-Trustee for 3011 Corp. (t/a US Books), whose charger has been revoked.

adult bookstores located within the county, US Books and Edgewood Books. The State's Attorney, Joseph Cassilly, believed that these bookstores were displaying sexually explicit materials in violation of Md. Ann. Code art. 27, Sect. 416D. That statute bans the display for advertising purposes of "any . . visual representation or image of a person or portion of a human body that depicts sadomasochistic abuse, sexual conduct or sexual excitement, or any verbal description or narrative account of these activities or items." The Maryland Court of Appeals has interpreted this provision to incorporate the principles of the United States Supreme Court's obscenity jurisprudence. See *Smiley v. State*, 450 A.2d 909 (Md. 1982). Violation of Sect. 416D is a criminal offense, punishable as a misdemeanor.

As part of this investigation, Deputy Sheriff Taylor visited both bookstores, noted how the materials were displayed, and purchased two magazines at each store. On the basis of this investigation, Taylor drafted affidavits to support applications for search warrants for the bookstores. Taylor submitted these to Cassilly, and upon receiving Cassilly's approval, filed the applications and supporting affidavits with a state judge on June 9, 1989.

Taylor's affidavit regarding the search warrant for US Books opened by reciting the statutory requirements of Sect. 416D, the criminal provision. It then described with specificity the building where the book store was located. Finally, the affidavit went into extensive and explicit detail about the depictions on the front and back covers of the two magazines Taylor had bought (entitled "She-Male Superstar" and "She-Male In Control"). Photostatic copies of the covers of these magazine were attached to the affidavit. Similar references and

representations were made in the affidavit supporting the application for a warrant for Edgewood Books. Based on these affidavits, Judge Cypert Whitfill issued warrants authorizing the authorities to "seize and remove all books, magazines, photographs, films, poster[s], and other items or materials that are displayed for advertising purposes which depict sadomasochistic abuse, sexual conduct, and sexual excitement." The judge indicated in the warrants that he was "satisfied that there is probable cause to believe" that such items were illegally displayed. There was no prior adversary hearing before the warrants were issued.

On June 13, 1989, these search warrants were served on the two bookstores. Some 1,130 magazines and other materials were seized from US Books, and 765 items were seized from Edgewood Books. On July 18 Cassilly filed a civil complaint in state court against the bookstores and sought a hearing to determine whether the bookstores possessed obscene materials. The complaint asked that the materials, if found to be obscene, be enjoined from dissemination, confiscated, and destroyed pursuant to Md. Ann. Code art. 27, Sect. 418A. This complaint was dropped before a determination of obscenity was made. In 1990 Cassilly filed criminal charges under Sect. 416D against the bookstores and their employees. Those criminal charges resulted in either acquittals or reversals on appeal.

Hicks filed this Sect. 1983 action against several law enforcement officers or officials involved in the June 13, 1989, seizure, including Cassilly and Taylor. This suit included allegations that Cassilly and Taylor violated the Constitution by applying for search warrants to seize material from the bookstores without a pre-seizure

hearing. The defendants moved for summary judgment base don qualified immunity. The district court granted qualified immunity to several of the defendants but denied it as to Cassilly and Taylor on the ground that the applications for the search warrants violated clearly established law that a mass seizure of allegedly obscene materials must be preceded by an adversary hearing. Cassilly and Taylor appeal.

II.

In order to overcome a claim of qualified immunity, a plaintiff must show that it was clearly established at the time of the alleged violation that the defendant's actions were unconstitutional. See *Wilson v. Layne*, 141 F.3d 111, 114 (4th Cir. 1998) (en banc). We therefore focus our inquiry on the state of the applicable law in June of 1989.

A.

"[T]he general rule under the Fourth Amendment is that any and all contraband, instrumentalities, and evidence of crimes may be seize under probable cause." *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 63 (1989). The rule is different for the seizure of allegedly obscene material, however. While obscene material enjoys no First Amendment protection, until an obscenity determination is made, targeted material is presumed to be protected by the First Amendment. Applying the general rule to the seizure of allegedly obscene material would therefore be an unconstitutional prior restrain on (presumptively) protected expressive material. Accordingly, the Supreme Court has established "rigorous procedural safeguards [that] must be employed before

expressive materials can be seized as 'obscene'." See id. at 62 (citing *Marcus v. Search Warrant*, 367 U.S. 717 (1961). In order to satisfy these safeguards, a warrant for the mass seizure of alelgedy obscene material with the purpose of taking that material out of circulation or preventing its display may not issue without a prior adversarial hearing. See *Quantity of Books v. Kansas*, 378 U.S. 205, 210 (1964).[2]

On the other hand, the Supreme Court has recognized that this right to a pre-seizure adversarial hearing is not absolute. In *Heller v. New York*, 413 U.S. 483 (1973), police officers obtained a warrant for the seizure of an allegedly obscene movie based on a criminal anti-obscenity statute. This seizure was intended to preserve the film as evidence in the criminal trial that followed. The Court refused to invalidate the seizure despite the defendant's claims that he was entitled to a pre-seizure adversarial hearing. The Court found that seizing an allegedly obscene work "for the *bona fide* purpose of preserving it as evidence in a criminal trial" does not contain the same danger of prior restraint as a seizure with intent to destroy that materia. Id. At 492. Accordingly, the Court concluded that the seizure of allegedly obscene material to preserve it as evidence in a criminal proceeding does not require a pre-seizure adversary hearing. See id. At 490; see also *New York v. P.J. Video, Inc.*, 475 U.S. 868, 873 (1986); *Fort Wayne Books*, 489 U.S. at 63 ("[A] single copy of a book or film may be seized and retained for evidentiary purposes based on a finding of probable cause").

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[2] Hicks does not dispute that if this special rule were not in the picture, the warrants were supported by and could have been issued on probable cause.

Therefore, the law was clearly established in June 1989 to this extent: a seizure of allegedly obscene materials for the purpose of destroying or halting their distribution required a pre-seizure adversarial hearing, while the same seizure for the purpose of preserving evidence for a subsequent criminal trial did not require such a hearing. We therefore examine Hick's allegations against both Cassilly and Taylor against this established principle.

B.

In this case the record reveals that State's Attorney Cassilly launched his investigation to find evidence of violations of Sect. 416D, a criminal statute. In an affidavit supporting his motion for summary judgment, Cassilly indicated that "the sole objective of the State's Attorney's office [in authorizing the search] was to obtain evidence of criminal violations of Art. 27, Sect. 416D." Cassilly also testified in his deposition that the whole purpose of the seizure under the search warrants was to obtain evidence for use at a criminal trial. See, *e.g.*, J.A. 479 (noting that the search warrant was focused to look for "violations of Sect. 416(d) [sic]"). Cassilly indicated that he "didn't have a problem" with Hicks selling the pornographic material, but Cassilly simply intended to stop its display in a manner that violated the criminal statute. This testimony is uncontradicted in the record.

Hicks points to only one matter which he claims supports an interference that Cassilly applied for the warrants with the intent to destroy the materials. Hicks highlights the fact that one month after the June 13 search of the bookstores, Cassilly filed a civil complaint

for injunctive relief under Md. Ann. Code Art. 27, Sect. 418A, which, if granted, would have led to the destruction of any materials found to be obscene. Hicks argues that complaint should be read to infer an intent by Cassilly to use the search warrant as a tool to seize allegedly obscene material from the bookstores in order to destroy it later. We disagree.

The complaint does not make clear whether its target includes the material seized under the search warrants on June 13, 1989, as Hicks suggests it does, or whether it is directed solely at other material which Hicks allegedly continued to display after the seizure. Since we are bound to construe the facts in favor of Hicks (the non-movant), we will assume that the material seized on June 13 is targeted by the complaint, even though Cassilly vigorously disputes this charge. The complaint also, however, asks the state court to "Order [Hicks] to Show Cause why the requested injunction should not be granted and the matters seized and destroyed." This indicates Cassilly's intent to submit to a pre-seizure adversarial hearing on all material to be seized and destroyed under the complaint.[3] Even assuming that the complaint covered those items already seized on June 13, those items could not have been destroyed pursuant to the complaint before a hearing was conducted. We cannot reasonably infer from these facts that Cassilly used the search warrants as a ruse to evade a pre-seizure adversarial hearing, only to ask for just such a hearing in his civil complaint filed a month later. Rather, the complaint can only be read to indicate that Cassilly intended to obey the constitutional rule requiring an

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[3] The hearing was never held, and Cassilly later voluntarily dismissed the complaint.

adversarial hearing before the allegedly obscene material could be seized and destroyed under the civil case. Finally, Cassilly did not switch exclusively to a civil proceeding (where a pre-seizure hearing was required) after some materials were seized under the criminal warrants. He eventually followed up on the warrants with criminal prosecutions.

Hicks has failed to produce any material evidence that the search warrants were intended for any purpose other than to preserve evidence for a criminal trial. Hick's attempt to establish a connection between the search warrants and the civil complaint is simply "too remote and too tenuous to create a genuine issue of material fact." *Ennis v. Nat'l Assoc. Of Bus. And Educ. Radio, Inc.*, 53 F.3d 55, 62 (4th Cir. 1995). Cassilly therefore did not violate clearly established law in reviewing and approving the search warrant applications. The district court's denial of qualified immunity for Cassilly must therefore be reversed.

C.

The evidence with regard to Deputy Sheriff Taylor even more clearly indicates that he is entitled to qualified immunity. The only evidence in the record concerning Taylor's motive in seeking the search warrants is his unsupporting affidavits for the warrants. Those affidavits clearly indicate that the searches were intended to gather evidence relating to violations of Sect. 416D, a criminal statute. Their reliance on the state criminal obscenity statute makes the affidavits virtually indistinguishable from the warrant upheld by the Supreme Court in *Heller*, 413 U.S. at 485. There is no mention of the civil statute which

permits material to be destroyed, nor is there any indication that Taylor intended to seize the evidence for any reason except to obtain evidence of a possible criminal violation. Furthermore, Hicks does not present any evidence suggesting that Taylor was involved in or even knew about Cassilly's decision to file a civil complaint a month after the search warrants were executed. While Hicks is entitled to reasonable inferences, he is not entitled to mere suppositions unsupported by the record. See *Ennis*, 53 F.3d at 62. Here, the uncontradicted evidence in the record demonstrates that Taylor obtained and executed the search warrants solely for the purpose of obtaining evidence in the criminal case. We therefore find that he did not violate clearly established law in obtaining the warrants. Accordingly, the district court erred in failing to grant summary judgment to Taylor on qualified immunity grounds.

III.

We conclude that Cassilly and Taylor did not violate clearly established law by obtaining search warrants (without a pre-seizure adversarial hearing) in order to seize allegedly obscene materials from Hicks as evidence for a criminal prosecution. We therefore reverse the judgment of the district court and remand with instructions that summary judgment be granted to Cassilly and Taylor on the grounds of qualified immunity.[4]

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[4] The district court also denied summary judgment to Mary Teresa Garland, an Assistant State's Attorney in Cassilly's office. Garland did not participate in obtaining the search warrants, and there is no evidence suggesting that she had any role in Cassilly's decision to file a civil complaint after the warrants were executed. Accordingly, the district court is also instructed to enter summary judgment for Garland on qualified immunity grounds.

REVERSED AND REMANDED WITH INSTRUCTIONS

FILED: September 14, 1998

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-2206(L)
(CA-89-2231-B)

LARRY C. HICKS, Director-Trustee for 3011 Corporation; L. R. NEWS, INCORPORATED, t/a Edgewood Books,

Plaintiffs-Appellees,

and

3011 CORPORATION, t/a US Books; JOSEPH J. LAVODIE; PATRICIA A. FULTON; PAUL EDWARD KOENIG; PATRICIA ANN MCGINNIS; WILLIAM L. PALMER, JR.; WILLIAM ENSOR; EDWARD E. CAGE,

Plaintiffs,

versus

JOSEPH I. CASSILLY, Individually and as States Attorney, Harford County, Maryland; M. TERESA GARLAND, Individually and as Assistant States Attorney, Harford County, Maryland,

Defendants-Appellants,

and

ROBERT COMES, in his official capacity as Sheriff for Harford County; DOMINIC J. MELE, Individually; JESSE BANE; J.R. TAYLOR; THOMAS GOLDING; ROY MITCHELL; MICHAEL BARLOW; FRED SHERRON; JAMES Stonesifer; JAMES M. HARKINS; EDWARD HOPKINS; EDWARD KECK; JAMES WAY, Individually and as Deputy Sheriffs, Harford County, Maryland; JOHN KUTZ; AL HAMLETT, in their official capacities only as members of the Federal Bureau of Investigation, Benson Everett Legg Air Field Office; BOB JONES, in his official capacity only as U.S. Postal Inspector; JOHN PHILIP, INCORPORATED; RAYMOND ASTOR,

Defendants.

ORDER

Appellees have filed a motion for leave to file their petition for rehearing with a suggestion for rehearing en banc on this Court's amended opinion.

The Court grants appellees' motion for leave to file the petition.

The appellees' petition for rehearing and suggestion for rehearing en banc were submitted to this Court. As no

member of this Court of the panel requested a poll on the suggestion for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that is should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing en banc are denied.

Entered at the direction of Judge Michael with the concurrence of Judge Motz and Judge Friedman, United States District Judge for the Eastern District of Virginia, sitting by designation.

For the Court

/s/ Patricia S. Connor

Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LARRY C. HICKS, Director-Trustee for 3011 CORP., L.R. NEWS, INC. E/a Edgewood Books, JOSEPH J. LAVODIE PATRICIA A. FULTON PAUL EDWARD KOENIG, PATRICIA ANN MCGINNIS, WILLIAM L. PALMER, JR., and EDWARD E. CAGE	*	
v.	*	CIVIL NO. B-89-2231
JOSEPH I. CASSILLY, Individually and as State's Attorney, Harford County, Maryland M. TERESA GARLAND, Individually and as Assistant States Attorney Harford County, Maryland ROBERT E. COMES, in his official capacity as Sheriff for Harford County DOMINIC J. MELE, Individually JESSE BANE J. R. TAYLOR THOMAS GOLDING	*	

ROY MITCHELL *
MICHAEL BARLOW,
FRED SHERRON, *
JAMES STONESIFER,
JAMES M. HARKINS *
EDWARD HOPKINS
EDWARD KECK, and *
JAMES WAY,
Individually and as *
Deputy Sheriffs
Harford County, Maryland *

Filed: July 24, 1997

William E. Seekford, Esquire of Towson, Maryland, for Plaintiffs.

Andrew H. Baida, Esquire, Office of the Attorney General, Baltimore, Maryland, for State's Attorney defendants, Jefferson L. Blomquist, Esquire and Diane T. Swint, Esquire Office of the County Attorney, Bel Air, Maryland, for Sheriff's Office defendants.

BLACK, SENIOR JUDGE

Presently pending before the Court are three summary judgment motions: (1) a Motion for Summary Judgment filed on behalf of defendants Dominick J. Mele, former Sheriff of Harford County, and Captain Jesse Bane, Captain James Stonesifer, Deputy Thomas Golding, Deputy J. Randy Taylor, Deputy James Harkins, Deputy Edward Hopkins, Deputy Edward Keck, and Deputy James Way (collectively "Sheriff's Office defendants"), all sued

individually and in their official capacities; (2) a Motion for Summary Judgment filed on behalf of defendants Joseph I. Cassilly, the Harford County State's Attorney, and M. Teresa Garland, a Harford County Assistant State's Attorney (collectively "State's Attorney defendants"), both sued individually and in their official capacities; and a Motion for Partial Summary Judgment filed on behalf of plaintiffs 3011 Corp., trading as U.S. Books ("U.S. Books"), [1] L.R. News, Inc., trading as Edgewood Books ("Edgewood Books"), Joseph J. LaVodie, Patricia A. Fulton, Paul Edward Koenig, Patricia Ann McGinnis, William L. Palmer, Jr., and Edward E. Cage[2] The issues raised by the motions have been briefed and the Court has had the benefit of oral argument at hearings held on November 3, 1995 and on November 30, 1995.

This case arises out of the execution by state law enforcement authorities of search and seizure warrants against U.S. Books and Edgewood Books, based upon a finding of probable cause that the stores were violating state obscenity laws. The two searches, both of which took place on June 13, 1989, resulted in the seizure of approximately 1,130 items from U.S. Books, and of approximately 1,130 items from U.S. Books, and of approximately 765 items from Edgewood Books.

All three summary judgment motions were filed on

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[1] During this litigation, plaintiff 3011 Corp. T/a "U.S. Books" had its charter forfeited by the State of Maryland and by Order of Court entered July 29, 1994, Larry C. Hicks, Director-Trustee for 3011 Corp. Was substituted as a party plaintiff therefor.

[2] Plaintiff William Ensor's claims were dismissed by the Court at oral argument on November 3, 1995, for failure to respond to discovery requests.

April 7, 1995. Both sets of defendants maintain that they are entitled to qualified immunity with respect to the claims in this case, and thus that summary judgment is appropriate. Opposing the motions, plaintiffs assert that qualified immunity is inappropriate on the grounds that the rights alleged to have been violated are clearly established, and that defendant' actions in violating those rights were not reasonable.

I. Facts

In November of 1988, the Harford County Sheriff's Office and State's Attorney's Office initiated an investigation into possible violations of Maryland obscenity laws at U.S. Books and Edgewood Books. The investigation was directed by State's Attorney Cassilly at the State's Attorney's Office, and by Deputy Taylor at the Sheriff's Office. During the course of the investigation, Cassilly and Taylor met several times to discuss how to establish probable cause for search and seizure warrants for the bookstores.

In civilian clothes, Taylor visited U.S. Books and Edgewood Books. He observed how materials were displayed at the stores, and purchased two magazines from each store. After gathering this evidence, Taylor prepared applications and affidavits for search and seizure warrants for the two bookstores, and submitted them to Cassilly for his review and approval. Upon receiving Cassilly's approval, Taylor submitted the applications and affidavits to Harford County Circuit Court Judge Cypert O. Whitfill on June 9, 1989.

The warrant applications described and included photocopies of the covers from the magazine Taylor purchased from each store. Each warrant stated that there

was "probable cause to believe that there is now bwing displayed for advertising purposes. . . books, magazines, photographs, films and posers which depict sadomasochistic abuse, sexual conduct, and sexual excitement" on the subject bookstore's premises, in violation of Maryland Annotated Code, Article 27, Sect. 416D.

Moreover, the language in each warrant tracked the language in the statute, authorizing the seizure of "all books, magazines, photographs, films, posters, and other items or materials, that are displayed for advertising purposes that depict sadomasochistic abuse, sexual conduct, or sexual excitement." Therefore, the warrants apparently vested within the executing officers the authority to determine which materials were obscene, and thus properly seizable, under the statute as interpreted in Smiley v. State, 294 Md. 461 (1982) (upholding the constitutionality of Section 416D by reading into it and requirement that materials within its scope fall under the Supreme Court's definition of obscenity). The warrants also authorized the seizure of "all correspondence, and records of any kind, reflecting the ordering, receipt, shipping, and payment for" the items that allegedly violated Sect. 416D.

On the morning of June 13, 1989, the day the warrants were to be executed, Cassilly, Taylor, and Assistant State's attorney Garland briefed the deputies who were part of the warrant execution teams as to the procedure for the searches and the scope of the search and seizure warrants. During execution of the warrants, the various individual plaintiffs were detained, asked for identification, and subjected to "pat down" searches, the severity of which is in some dispute. Also, plaintiffs claim that the searches were videotaped by federal agents at the scene, as well as by local

medica invited by the defendants in this action.

Garland staffed a command post at U.S. Books throughout the search to answer any questions by the deputies about whether an item should be seized. Pursuant to the warrants, the law enforcement officials seized approximately 1,130 items from U.S. Books, and approximately 765 items from Edgewood Books.

The two stores, along with seven other individual plaintiffs comprised of store employees, a janitor and handyman at U.S. Books, and private customers present during execution of the warrant at U.S. Books, filed suit against three distinct categories of defendants. The first included all of the state law enforcement officials who participated in obtaining and executing the warrants. The second category included two Federal Bureau of Investigations Agents and a United States Postal Inspector, all of whom were invited to the searches to investigate possible violations of federal laws. The third category included John Philip, Inc., the landlord of U.S. Books, and Raymond Astor, a private individual whom plaintiffs claim participated in the overall conspiracy to deprive plaintiffs of their constitutional rights. Plaintiffs have dismissed their claims against the second and third categories of defendants. Consequently, only the first category of defendants remains in the case.

Counts one through Six of the complaint seek monetary relief fro rights violations[3] on a variety of legal theories, including objection and execution of an

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[3] The federal claims asserted in the Complaint are based on 42 U.S.C. Sect. 1983, the plaintiffs having abandoned their claims under 42 U.S.C, Sect. 1985.

unconstitutional search warrant (Count One); unconstitutional search and seizure of the individual plaintiffs without warrant or probable cause (Count Two); unlawful detention, false arrest, and false imprisonment of the individual plaintiffs without a warrant or probable cause (Count Three); assault and battery of the individual plaintiffs (Count Four); unconstitutional prior restraint of plaintiffs' First Amendment rights (Count Five); and violation of plaintiffs' constitutional right to privacy (Count Six). The plaintiffs also seek a judgment declaring unconstitutional the State criminal statutes underlying the searches and seizures and the procedures followed by the defendants herein, and injunctive relief (1) requiring the return of materials seized, (2) enjoining all criminal prosecutions based on the searches and seizures, and (3) preventing the future use of the criminal statutes that are the subject of the declaratory judgment request.

On March 23, 1990, this Court granted in part and denied in part defendants' Motion to Dismiss or for a Stay, which was based upon federal abstention principles. The Court held that the abstention was inappropriate as to plaintiff bookstores' claims for injunctive and declaratory relief touching on the alleged mass seizure of materials without a prior adversarial hearing, as to the individual plaintiffs' claims for declaratory and injunctive relief, and as to all plaintiffs' claims for damages. However, the Court stayed all of these claims pending resolution of the ongoing criminal and civil proceedings before the courts of Harford County. The Court also granted defendants' motion to the extent it sough abstention and dismissal of the bookstores' remaining claims for declaratory and injunctive relief.

In July of 1994, upon conclusion of the state

proceedings, the Court lifted the stay. Subsequently, the Court entered an order scheduling discovery and the filing of summary judgment motions.

II. Summary Judgment and Qualified Immunity Standards

Under rule 56 of the Rules of Civil Procedure, a motion for summary judgment can only be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 884 (1990). Summary Judgment is not appropriate unless, viewing the possible inferences in a light most favorable to the non-moving party, no reasonable jury could return a verdict in its favor. Helm v. Western Maryland Ry. Co., 838 F.2d 729, 734 (4th Cir. 1988); See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). The court must ask "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 251-52. It should also be noted that in the Fourth Circuit the standard for summary judgment is strict, and that summary judgment is inappropriate even if merely the inferences to be drawn from the facts are in dispute. Morrison v. Nissan Motor Co., Ltd., 601 F.2d 139, 141 (4th Cir. 1979); Pulliam Inv. Co., Inc. v. Cameo Properties, 810 F.2d 1282, 1286 (4th Cir. 1987).

Nonetheless, when a motion for summary judgment has been made and supported, Rule 56(e) provides that an adverse party may not rest upon mere allegations or denials of the adverse party's pleading, but must set forth specific facts showing that there is a genuine issue for trial. There mere existence of a scintilla of evidence is insufficient.

Rather, there must be evidence from which the jury could reasonably find for the nonmoving party. Anderson, 447 U.S. at 251. In the absence of such a minimal showing, the moving party should not be required to undergo the considerable expense of preparing for and participating in a trial.

In any event, however, a trial court may deny summary judgment "in a case where there is reason to believe that the better course would be to proceed to a full trial." Anderson, 477 U.S. at 255. Such an approach harmonizes well with the court's duty to exercise caution in resolving motions for summary judgment.

Defendants argue that as government officials, the doctrine of qualified immunity protects them from damage liability int his case, and that such immunity mandates that the Court grant them summary judgment.

The doctrine of qualified immunity applies to actions brought under 42 U.S.C. Sect. 1983. See Harlow v. Fitzgerald, 457 U.S. 800, 818 n. 30 (1982). Under this doctrine, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights o which a reasonable person would have known." Id. At 818. State another way, qualified immunity will protect government officials exercising discretionary functions from civil damages liability "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." Anderson v. Creighton, 483 U.S. 635, 638 (1987).

The Supreme Court has defined "clearly established

law" to require that "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that when he is doing violates that right. Anderson, 483 U.S. at 640. "In short, officials cannot be held to have violated rights of which they could have known" Pinder v. Johnson, 54 F.3d 1169, 1173 (4th Cir.), cert. Denied, 116 S. Ct. 530 (1995) (citing Gooden v. Howard County, Md., 954 F.2d 960, 968 (4th Cir. 1992) (en banc).

The Fourth Circuit has summarized the analysis for resolving qualified immunity issues as follows:

> Ruling on a defense of qualified immunity. . . requires (1) identification of the specific right allegedly violated; (2) determining whether at the time of the alleged violation the right was clearly established; and (3) if so, then determining whether a reasonable person int he officer's position would have known that doing what he did would violate that right. The first tow of these present pure questions of law for the courts. The third, which involves application of Harlow's objective test to the particular conduct at issue, may require factual determinations respecting disputed aspects of that conduct.

Pritchett v. Alford, 973 F.2d 307, 312 (4th Cir. 1992) (citations omitted). Indeed, despite the urging by the Supreme Court that qualified immunity issues be resolved at the summary judgment stage, the Fourth Circuit has noted that "[i]f there are genuine issues of historical fact respecting the officer's conduct or its reasonableness under the circumstances, summary judgment is not appropriate, and the issue must be reserved for trial." Id. At 313.

III. Mele and Bane

As an initial matter, the Court finds that summary judgment is appropriate in favor of Captain Bane and Sheriff Mele[4] on all counts, because a claim under 42 U.S.C Sect. 1983 cannot be predicated on the doctrine of respondeat, superior, City of St. Louis v. Praprotnik, 485 U.S. 112, 121 (1988); Pembaur v. City of Cincinnati, 475 U.S. 469, 478 (1986), and because there is no evidence that these officers either participated in the procurement of the warrants at issue here or assisted in the execution of those warrants. The Court will consider each count separately in assessing the potential liability of the remaining defendants.

IV. Warrants

At issue in Count One is the constitutionality of the warrant applications.[5] Plaintiffs allege that the warrants were deficient for several reasons, including, inter alia, that they permitted the officers to seize "all" books on display that met the requirements of Sect. 416D, without regard to the Supreme Court dictates concerning prior restraint. In opposition, defendants maintain that they were entitled to rely on Judge Whitfill's finding that the search and seizure warrants were supported by probable cause.

As an initial matter, the Court notes that Taylor was the only Sheriff's Office defendant to have any role in procuring the search and seizure warrants that were executed at U.S. Books and Edgewood Books. Moreover,

[4] Summary judgment is also appropriate for the current Sheriff for Harford County, Robert E. Comes, in his official capacity.

[5] Although plaintiffs assert that Count One also applies to the constitutionality of the execution of the search and seizure warrant, the Court finds that this allegation is sufficiently addressed by Count Five of the complaint

while Cassilly headed up the investigation at the State's Attorney's Office, meeting with Taylor several times and reviewing the warrant applications and affidavits before they were submitted to Judge Whitfill, little evidence has been presented linking Assistant State's Attorney Garland to the procurement of the search and seizure warrants.[6] Accordingly, summary judgment is appropriate on this count in favor of all Sheriff's Office defendants other than Taylor and in favor of Garland.

In determining whether defendants Taylor and Cassilly have qualified immunity on this count, the Court must first decide whether the right allegedly breached by defendants- the right not to be subject to an unconstitutional prior restraint- is clearly established. The Supreme Court has considered the constitutionality of prior restraints of potentially obscene material in a series of cases beginning with Marcus v. Search Warrants of Property at 104 East Tenth St., Kansas City, Mo., 367 U.S. 717 (1961).

In Marcus, and also in A Quantity of Copies of Books v. Kansas, 378 U.S. 205 (1964) (hereinafter "Books"), the Court considered the constitutionality of seizures of numerous copies of selected books without prior adversary

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[6] There has been evidence that Cassilly showed Garland the warrant applications before they were submitted to Judge Whitfill. However, plaintiffs have failed to present evidence linking Garland in any substantive way to the acquisition of the warrants. Moreover, Garland stated in an affidavit that she "did not participate in any manner in the preparation of any of [the warrant applications]." Evidence that she saw the applications, without more, cannot justify holding her liable on this count.

hearings.[7] The Court in both cases invalidated these seizures as violative of the First and Fourteenth Amendments to the Constitution. Marcus 367 U.S. at 738; Books, 378 U.S. at 213.

In Books, the Court noted that "[s]tate regulation of obscenity must 'conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line.'" Id. At 210 (quoting Bantam Books, Inc v. Sullivan, 372 U.S. 58, 66 (1963). Accordingly, the Court concluded that pretrial seizures of First Amendment materials would only be upheld pursuant to a "procedure 'designed to focus searchingly on the question of obscenity.'" 378 U.S. at 210 (quoting Marcus, 367 U.S. at 732).

Moreover, the Books court found that the constitutional deficiency could not be cured by an adversary hearing held after the seizure, stating: "[I]f seizure of books precedes an adversary determination of their obscenity, there is danger of abridgment of the right of the public in a free society to unobstructed circulation of nonobscene books." 378 U.S. at 213. See also Greenmount Sales, Inc. v. Davila, 479 F.2d 591, 594 (4th Cir. 1973) (interpreting Books to mean that "absent an adversary hearing a substantial threat exited that the right of non-obscene publications to unobstructed circulation would be impinged through massive seizures of material deemed obscene solely on the basis of an ex parte hearing'") (quoting United States

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[7] The police in Books had seized 1,715 copies of 31 novels. 378 U.S. at 208. Marcus involved seizure of 11,000 copies of 280 publications. 367 U.S. at 723.

v. Alexander, 428 F2d 1169, 1172 (8th cir. 1970) (emphasis added by Greenmount court).

The court fine-tuned this standard in Heller v. New York, 413 U.S. 483 (1973), a case involving the exhibition of a sexually explicit film. The Heller court noted that "seizing films to destroy them or to block their distribution or exhibition is a very different matter from seizing a single copy of a film for the bona fide purpose of preserving it as evidence in a criminal proceeding." Id. At 492. Accordingly, the Court concluded that seizure of a single copy of a film for evidentiary purposes based on a finding of probable cause was constitutionally valid, but that "[c]ourts will scrutinize any large-scale seizure of books, films, or other materials presumptively protected under the First Amendment to be certain that the requirements of . . . Books and Marcus are fully met." Id. At 491. The Court finds that Marcus and its progeny clearly establish the right to an adversarial hearing prior to a mass seizure.

The Court must next consider whether, in light of this clearly established law, defendants Taylor and Cassilly acted reasonably in submitting warrant applications that requested seizure of "all" items that allegedly violated Sect. 416D. Defendants maintain that it was reasonable for them to rely on Judge Whitfill's determination that probable cause existed in issuing the warrant. However, Supreme Court case law leads the Court to a different conclusion.

In Malley v. Briggs, 475 U.S. 335 (1986), a police officer argued that he was entitled to rely on a judicial officer's determination that probable cause existed. The Supreme Court rejected this assertion, holding that the appropriate inquiry was "whether a reasonably well-trained

officer in [this officer's] position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant." Id. At 345. The Court continued:

> If such was the case, the officer's application for a warrant was not objectively reasonable, because it created the unnecessary danger of an unlawful arrest. It is true that in an ideal system an unreasonable request for a warrant would be harmless, because no judge would approve it. But ours is not an ideal system, and it is possible that a magistrate, working under docket pressures, will fail to perform as a magistrate should. We find it reasonable to require the officer applying for the warrant to minimize this danger by exercising reasonable professional judgment.

Id. At 345-46. In a footnote, the Court also noted that "where a magistrate acts mistakenly in issuing a warrant but within the range of professional competence of a magistrate, the officer who requested the warrant cannot be held liable." Id. at 346 n.9. Nevertheless, "it is different if no officer of reasonable competence would have requested the warrant." Id.

Malley makes clear that Judge Whitfill's issuance of the warrant does not, in and of itself, shield defendants from liability. While objection of a warrant may provide the officer some protection for suit under 42 U.S.C Sect. 1983, See Torchinsky v Siwinski, 942 F.2d 257, 262 (4th Cir. 1991), there is no per se rule of immunity based upon the issuance of a warrant. Rather, where a clearly established right is involved, a finding of qualified immunity depends on whether defendants' actions were reasonable. Being highly

fact specific, this determination is properly reserved for trial. See Pritchett v. Alford, 973 F.2d at 312. Additionally, because liability on this count rises or falls with the reasonableness of defendants' conduct, the Court finds that, in this case, "the better course would be to proceed to a full trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).[8]

Finally, the Court must determine which plaintiffs have demonstrated an actionable claim under Count One. At the hearing held on November 30, 1995, plaintiffs' counsel argued that all plaintiffs have suffered an actionable injury under Count One in that each has had his constitutional right to disseminate or to receive first amendment materials infringed by defendants' conduct. Finding no factual or legal basis for the individual plaintiffs' claims under Court One, the Court will grant all defendants' summary judgment motions on Count One with respect to claims of the individual plaintiffs. In summary, defendants motions for summary judgment will be denied with respect to plaintiff bookstores' claims against defendants Taylor and Cassilly, and will be granted in all other respects.

V. Prior Restraint

Count Five of the complaint alleges an unconstitutional prior restraint. As with Count One, the corporate plaintiffs are the only plaintiffs to have actionable

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[8] Plaintiffs also maintain that the warrants were deficient because they did not require that the enumerated materials be obscene, and thus did not leave the determination of obscenity to a neutral and detached judicial officer. Because the Court will deny summary judgment on this count as to defendants Taylor and Cassilly, the Court does not reach this argument

claims on this count. Accordingly, with respect to the individual plaintiffs, summary judgment is granted in favor of all defendants. Moreover, as discussed above, the law is clear that a mass seizure without a prior adversarial hearing violates a plaintiff's constitutional rights. Nevertheless, defendants are entitled to qualified immunity on this count if their conduct in seizing the items at U.S. Books and Edgewood Books was reasonable.

To a larger extent, the reasonableness of defendants actions rests on whether the seizures at U.S. Books and Edgewood Books clearly amount to mass seizures warranting protection under Marcus and its progeny. The seizure at U.S. Books consisted of approximately 1130 items, including 332 magazines which were taken from behind the counter. At Edgewood Books, the law enforcement officials seized approximately 765 items. Multiple copies of some magazines were seized at each store. On their face, these seizures appear to be mass seizures.

Defendants nevertheless maintain that these seizures do not clearly warrant protection under Marcus. In support of this argument, defendants note (1) that not all items in the bookstores were seized; (2) that subsequent to the seizure, the state returned all items to the bookstores other than the items they needed for evidence; and (3) that the books that were retained were subsequently determined to be obscene.

None of these factors dissuade the Court from determining that a trier of fact could find that the seizures at U.S. Books and Edgewood Books were mass seizures. For purposes of prior restraint analysis, it is irrelevant that many of the sized items were subsequently returned or that some of the seized items were later found to be obscene.

Further, in evaluating whether a seizure constitutes a "mass seizure," it is irrelevant whether all items at the store are seized. It is sufficient that a large quantity of items, including multiple copies of some of the items, be seized.

Defendants also assert that, because this is a civil case, plaintiffs have the burden of showing that they engaged in speech that is protected by the First Amendment, and that plaintiffs cannot meet this burden because a jury found some of the seized items to be obscene. However, defendants cite no authority for this proposition. Additionally, this claim misses the mark. With regard to prior restraint, it is irrelevant that items are later found to be obscene. The relevant question is whether there was an adversarial hearing as to obscenity before the possibly obscene items were seized.

Defendants further maintain that their conduct was reasonable because the seizures were made pursuant to a warrant. On the specific issue of the execution of a search warrant, the Fourth Circuit has stated as follows:

> It is undisputed on the record that defendant . . participated only in the execution of the search warrant . . The trial court found that because the search was conducted pursuant to a valid warrant, the officers were entitled to immunity from any claim arising out of this search based upon the objective reasonableness of their conduct. . . Because [defendant] is alleged to have participated only in this search, there is certainly no genuine issue as to whether he violated clearly established law.

Turner v. Dammon, 848 F.2d 440, 447 (4th Cir. 1988) (citations omitted).

Other courts considering this issue have reached the

same conclusion. For example, in Hall v. Lopez, 823 F.Supp. 857 (D. Colo. 1993), the District of Colorado determined that "when we examine the reasonableness of an officer's actions when the officer executes a search warrant secured by another officer, the standard becomes one of good faith." Id. At 861. The Hall court distinguished Malley by noting that "[i]n Malley, the officer who executed the search warrant was also the officer who applied for it. He was aware of the facts underlying the warrant and could not claim reliance on its valid procurement by another. The Supreme Court therefore was not called upon to address the fellow officer rule." Id. At 861 n.2. See also Morris v. County of Tehama, 795 F.2d 791, 795 (9th Cir. 1986) ("[F] or purposes of section 1983 immunity, an officer is entitled to assume the validity of a search warrant secured by fellow officers.") (emphasis in original).

These cases persuade the Court to consider the potential liability of Taylor, Cassilly, and Garland separately from that of the remaining defendants who participated in the execution of the search warrant. It is clear that Taylor and Cassilly, as the officials who procured the warrant, are not sheltered by the existence of the warrant. Accordingly, summary judgment will be denied on this count as to them. It is also clear under Turner That the officers who were involved only in the execution of the warrant could reasonably rely on the validity of the warrants. Thus, defendants Stonesifer, Golding, Mitchell, Barlow, Sherron, Harkins, Hopkins, Keck, and Way are entitled to summary judgment on this count.

Assessing Garland's potential liability on this count is more difficult. Although she did not participate in the procurement of the warrants, she was involved in planning

the execution of the warrants and assisted in briefing the officers about what they could seize under the warrants. Additionally, she had a supervisory role in the execution of the warrants. She staffed a command post at U.S. Books, advised the officers about whether specific items could be seized, and spoke to members of the press on the premises. Moreover, as an attorney, Garland is charged with greater knowledge of the law than are law enforcement officers. Indeed, the Court is unaware of any holding comparable to Turner that adjudges it reasonable as a matter of law for an attorney who is substantially involved in the execution of a warrant to rely on the validity of the warrant without making an independent determination that the seizure is constitutional. For the above reasons, the Court finds that summary judgment is not appropriate on this count as to Garland.

VI. Seizure of Individual Plaintiffs

As to the individual plaintiffs' claims to Count Three that they were unconstitutionally seized during the execution of the warrants, defendants assert that immunity is proper because plaintiffs, as individuals found on the premises, did not have a clearly established right to be free from detention during the execution of the search and seizure warrants.

As a general rule, law enforcement officials must have probable cause before seizing a person, even if the seizure does not amount to a formal arrest. Dunaway v. New York, 442 U.S. 200 (1979). The Supreme Court, however, has made several exceptions to this rule. One such exception was set out in Michigan v. Summers, 452 U.S. 692 (1981). There, the Court held that "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the

premises while a proper search is conducted." Id. At 705.

While the Summers court expressly refrained from deciding "whether the same result would be justified if the search warrant merely authorized a search for evidence [,]" id. at 705 n.20, this issue has been implicitly settled by the Fourth Circuit in United States v. Smith, 704 F.2d 723 (4th Cir.) cert. denied sub nom. Palmer v. United States, 464 U.S. 817 (1983). In Smith, the Fourth Circuit considered whether officers had the right to detain a suspected gambler on his premises as they searched for his gambling records. Without analysis, the court held that the officers could detain the occupants while a proper search was conducted, and cited Summers as authority for that holding. Id. at 725. See also Daniel v. Taylor, 808 F.2d 1401, 1405 (11th Cir. 1986) (holding that law enforcement officers who detained the plaintiff for two hours and forty-five minutes while searching for evidence at her business were entitled to qualified immunity because no clearly established constitutional rights were violated).

Summers and Smith can be distinguished from the present case, as the search and resulting detention in both Summers and Smith stemmed from probable cause which focused suspicion on the very individuals who were detained. Thus, in those cases, there was a reasonable, particularized suspicion that the person being detained had committed a criminal act. Such particularized suspicion was a factor considered by the Court in Summers to justify the detention of individuals on something less than probable cause. The Summers court stated that "[i]f the evidence that a citizen's residence is harboring contraband is sufficient to persuade a judicial officer than an invasion of the citizen's privacy is justified, it is constitutionally reasonable to require that

citizen to remain." 452 U.S. at 704-05, (emphasis added).

With respect to the employees at the two book stores, such particularized suspicion probably existed, particularly in light of Md. Ann. Code art. 27 Sect. 416F (1992), which causes any employee found on the premises during a violation of Sect. 416D to be guilty of violating Sect. 416D. Such particularized suspicion is absent, however, with respect to plaintiff Palmer, a customer at U.S. Books. Nevertheless, the existence of individualized suspicion in Summers was merely one factor to be considered in determining the constitutionality of the detention. Consequently, its absence would not clearly establish that the detention was unconstitutional. Indeed, the Smith court, in finding detention to be proper, made no mention of the factors considered by the Summers court, but rather stated in broad terms its conclusion that detention was proper.

Given this legal context, it is certainly arguable that the officers in the instant case had the authority to detain all of the plaintiffs for the duration of the search. However, the Court need not resolve that issue today. It is enough to recognize that the law is unclear as to when it is impermissible to detain an occupant of a premises pursuant to a lawful search of that premises. The unsettled character of this legal issue is apparent, and demonstrates that the detention did not result in the violation of a clearly established right. Accordingly, all defendants are entitled to qualified immunity from liability on this count.

VII. Search of Individual Plaintiffs

The Court reaches a different result with respect to the individual plaintiffs' claims in Count Two that they were unconstitutionally searched during the execution of the

search and seizure warrants. In Ybarra v. Illinois, 444 U.S. 85 (1979), the Supreme Court considered whether a search warrant authorizing the search of a tavern and its bartender for contraband also implicitly authorized the search of a customer at the tavern. The Court found that it did not, holding that because the police lacked a reasonable belief that the patron was involved in any criminal activity or that the patron was armed or dangerous, the search violated his rights under the Fourth and Fourteenth Amendments Id. At 92-96. In so holding, the Court explicitly rejected the defendant's position that the frisk of the customer constituted a reasonable search for weapons under Terry v. Ohio 392 U.S. 1 (1968. Id. at 343. Rather, the Court noted that "[t]he 'narrow scope' of the Terry exception does not permit a frisk . . . on less than reasonable belief or suspicion directed at the person to be frisked, even though that person happens to be on premises where an authorized narcotics search is taking place." Ybarra, 444 U.S. at 94.

The effect of Ybarra on the availability of qualified immunity has been addressed in a few cases. In James by James v. Sadler, 909 F.2d 834 (5th Cir. 1990), the Fifth Circuit considered whether the qualified immunity doctrine protected police defendants who had conducted a pat-down search of a customer at a beauty salon. The court held that "[t]he right to be free from an unreasonable pat-down search is a constitutional right sufficiently contoured to remove the defendant's actions from the protection of the immunity doctrine." Id. At 838. Accordingly, the court found that the district court's grant of summary judgment in favor of defendants was improper as to this charge. See also Patrykus v. Gomilla, 1988 WL 87045. *4 (N.D. I11) (finding that Ybarra doctrine is clearly established and, therefore, that qualified immunity does not shield police defendants

who conducted a pat-down search of customers at a bar) Johns v. Deleonardis, 1994 WL 323164, *7 (N.D. I11) (Citing Ybarra in determining that "qualified immunity is unlikely to shield the Defendants from liability").

Defendants in the instant case assert that the holding in Ybarra does not amount to clearly established law. In support of this contention, defendants again rely on Michigan v. Summers. However, Summers is not persuasive here because the Summer court expressly distinguished its holding from that in Ybarra:

> The "seizure" issue in this case should bot be confused with the "search" issue presented in Ybarra . . In this case, only the detention is at issue. The police knew respondent lived in the house, and they did not search him until after they had probable cause to arrest and had done so.

452 U.S. at 695 n.4.

A 1990 Supreme Court case reaffirmed the Supreme Court's dedication to Ybarra. In Maryland v. Buie, 494 U.S. 325 (1990), the Court held that the reasonable suspicion standard applies to protective sweeps. Id. At 334. Finding Ybarra to be a more analogous case than Summers, the Court pronounced that "the reasonable suspicion standard . . Strikes the proper balance between officer safety citizen privacy." Id. at 334 n.2. It also notable that no Fourth circuit case has called into question the holding of Ybarra. The Court finds that the right not to be searched in the absence of a reasonable, particularized suspicion, as delineated in Ybarra and its progeny, is clearly established.

Defendants cite Second Circuit and District of

Connecticut cases in an attempt to show that the condition of the law is unclear. See Rivera v. United States, 928 F.2d 592, 606 (2nd Cir. 1991); Collier v. Locicero, 820 F. Supp. 673, 678 (D. Conn. 1993). However, these cases do not have precedential effect in this district, and thus do not diminish the Supreme Court's holdings in Ybarra and Buie.[9]

In applying these clearly established legal principles to the facts in this case, it is necessary to consider separately the allegations of each plaintiff. McGinnis, who was a sales clerk at Edgewood Books, testified at deposition that she was never searched during the execution of the search and seizure warrant at Edgewood Books. She also testified that she gave permission to the officers to search her pocketbook. Consequently, McGinnis's claim o fan unconstitutional search cannot withstand summary judgment. Because McGinnis was the only plaintiff present at Edgewood Books when the search and seizure warrant was executed there, summary judgment on this count is properly granted in favor of defendants Harkins, Hopkins, Keck, and Way.

Other than McGinnis, all of the individual plaintiffs were at U.S. Books when the search and seizure warrants were executed. Fulton, who was working as a sales clerk at the time, was not patted down or physically touched by any officer. Her pocketbook and tote bag were searched by a deputy. However, a provision in the warrant required

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[9] Defendants also assert that summary judgment is appropriate on this count because plaintiffs have not demonstrated that the officers who patted them down were from the sheriff's office. The Court does not find merit in this argument. Plaintiffs' inability to identify the specific officers who patted them down is likely a failure of the discovery process that may be cured at trial.

seizure of "all correspondence, and records of any kind, reflecting the ordering, receipt, shipping, and payment for" the items that allegedly violated Sect. 416D. Because such correspondence could possibly be found in Fulton's pocketbook and tote bag, a search of those items was justified under the warrant, and cannot amount to a constitutional violation.

The remaining individual plaintiffs- LaVodie, Cage, Koenig, and Palmer- allege that they were patted down at least tow times by the officers. LaVodie was the manager of U.S. Books and Edgewood Books; Cage was a handyman who was repairing an air conditioner and a sign when the officers arrived; and Koenig was engaged in janitorial services at U. S. Books. All three of these men were outside in the rear parking lot at U.S. Books when the officers entered the store. While securing the building, a few deputies came out, patted these men down, and directed them into the store. Once inside, the men were patted down again by other deputies. Palmer, a customer, claims that he was patted down three times and that the third pat down was conducted solely for the purpose of allowing the news media to get a picture of an officer patting someone down at U.S. Books. Palmer also alleges that the officer who orchestrated the first pat down put his hands in Palmer's pockets and took a shirt out of Palmer's hand.

Defendants have failed to produce evidence that the officer had a reasonable suspicion that any of these men were in possession of a weapon or other contraband. Accordingly, the allegations of LaVodie, Cage, Koenig, and Palmer are sufficient to survive the summary judgment motion made by the Sheriff's Office defendants who executed the warrant at U.S. Books- namely, Taylor,

Golding, Mitchell, Barlow, and Sherron. Summary judgment is appropriate, however, as to captain Stonesifer, as he was not present when the U.S. Books premises were secured. Summary judgment will also be granted in favor of the State's Attorney defendants on this count because the evidence does not establish that these defendants were involved in the allegedly unconstitutional searches or in the decision to conduct those searches.

VIII. Assault and Battery

Count Four, alleging assault and battery, involves the same events as the unconstitutional search allegations. In light of the Court's decision to go to trial on some plaintiffs' claims of unconstitutional searches, the Court finds it appropriate to proceed to trial on this count to the same extent as it is moving forward on Count Two. Defendants assert that they are entitled to public official immunity on the pendant state claim for
assault and battery, regardless of whether plaintiffs' claims in Count Two go forward. The Court disagrees.

In Maryland, public official immunity can be established by showing that "(1) the individual actor, whose alleged negligent conduct is at issue, is a public official rather than a mere government employee or agent, and (2) his tortious conduct occurred while he was performing discretionary, as opposed to ministerial, acts in furtherance of his official duties." James v. Prince George's County, 288 Md. 315, 323 (1980). Upon establishing these elements, "a qualified immunity attaches; namely, in the absence of malice, the individual involved is free from liability." Id. at 323-24.

It is also well settled under Maryland law that "[p]ublic official immunity is not a defense to . . . intentional torts." Ashton v. Brown, 339 Md. 70, 117 (1995); Parker v. State, 337 Md. 270, 285 (1995) ("[T]his Court has never sustained the defense of public official immunity to an intentional tort action . . . "); Cox v. Prince George's County, 296 Md. 162, 169 (1983) ("[A] police officer does not enjoy this immunity if he commits an intentional tort or acts with malice."). These Maryland cases establish that defendants in this case are not entitled to public official immunity regarding the assault and battery allegations in Count Four.

IX. Right to Privacy

In Count Six, plaintiffs claim that defendants violated their constitutional right to privacy by permitting the news media to videotape and photograph them, thereby causing their likenesses to be published openly to the general public. However, Supreme Court case law illustrates that claims for injury to reputation do not rise to the level of constitutional torts are not compensable under 42 U.S.C. Sect. 1983.

In Paul v. Davis, 424 U.S. 693 (1976), plaintiff brought a Sect. 1983 action against police officials who had circulated to merchants a flier in which plaintiff was identified as a shoplifter. Plaintiff asserted that "[i]mputing criminal behavior to an individual is generally considered defamatory per se, and actionable without proof of special damages." Id. at 697. The Court rejected this contention, holding that "the interest in reputation asserted in this case is neither 'liberty' nor 'property' guaranteed against state deprivation without due process of law." Id. at 712. The Court also rejected plaintiff's contention that the defendants

violated his right to privacy, stating that there is no "constitutional protection against the disclosure of the fact of his arrest on a shoplifting charge." Id. at 713.

The Supreme Court reaffirmed this view in Seigert v. Gilley, 500 U.S. 226 (1991). There, the plaintiff brought an action against his former government supervisor who had allegedly written a defamatory letter. Id. at 229. Finding that "injury caused by the defendant to a plaintiff's reputation . . . is not recoverable in a [civil rights] action [,]" id. at 234, the Court held that the supervisor was entitled to qualified immunity because his actions did not violate any clearly established law. Id. at 234-35. In responding to plaintiff's allegation that defendant acted with malice in defaming him, the Court added: "Our decision in Paul v. Davis did not turn . . . on the state of mind of the defendant, but on the lack of any constitutional protection for the interest in reputation" Id. at 234.

These cases are dispositive of Count Six in the instant action. According to plaintiffs' Complaint, defendants made it appear that plaintiffs had "been engaging in criminal conduct," and "plac[ed] plaintiffs in a false light as to their presence upon the premises." This conduct, even if true, is no different from the alleged actions of the defendants in Paul and Seigert, and does not, therefore, amount to a constitutional violation. Indeed, plaintiffs' counsel appeared to concede this point at oral argument. Accordingly, all defendants are entitled to qualified immunity with respect to Count Six. See also Wildauer v. Frederick County, 993 F.2d 369, 3736 (4th cir. 1993) (stating that "Sect. 1983 cannot be used as a vehicle for asserting a claim of defamation").

X.

For all of the foregoing reasons, the Court (1) will grant in part and deny in part the motion for summary judgement filed on behalf of the Sheriff's Office defendants; (2) will grant in part and deny in part the motion for summary judgment filed on behalf of the State's Attorney defendants; and (3) will deny plaintiff's motion for partial summary judgment.[10] A formal Order will be entered in conformity with this Memorandum Opinion.

July 24, 1997

Walter E. Black, Jr.
Senior Judge

[10] Plaintiffs' motion appears to address many of the same issues as defendants' motions which have been discussed at length in this opinion. As to those claims where summary judgment has been granted to defendants, denial of plaintiffs' motion speaks for itself. As to those claims where summary judgment has been denied, the Court has found disputes of material fact preventing summary judgment for any party.

ORDER

In accordance with the Memorandum Opinion filed today in the above-captioned case, IT IS, this 24th day of July, 1997, by the United States District Court for the District of Maryland,

ORDERED,

(1) That the Sheriff's Office defendants' Motion for Summary Judgment (Paper 44) BE, and the same hereby IS, GRANTED IN PART AND DENIED IN PART, as follows:

(a) As to Counts Three and Six, that the motion BE, and the same hereby IS, GRANTED;

(b) As to Counts One and Five:

(i) That the motion BE, and the same hereby IS, DENIED with respect to plaintiff bookstores' claims against defendant Taylor; and

(ii) That the motion BE, and the same hereby IS, GRANTED in all other respects;

(c) As to Counts Two and Four:

(i) That the motion BE, and the same hereby IS, DENIED with respect to the claims of plaintiffs LaVodie, Cage, Koenig, and Palmer against defendants Taylor, Golding, Mitchell, Barlow, and Sherron; and

(ii) That the motion BE, and the same

hereby IS, GRANTED in all other respects;

(2) That the State's Attorney defendants' Motion for Summary Judgment (Paper 46) BE, and the same hereby IS, GRANTED IN PART AND DENIED IN PART, as follows:

(a) As to Counts Two, Three, Four, and Six, that the motion BE, and the same hereby IS, GRANTED;

(b) As to Count One:

(i) That the motion BE, and the same hereby IS, DENIED with respect to plaintiff bookstores' claims against defendant Cassilly; and

(ii) That the motion BE, and the same hereby IS, GRANTED in all other respects;

(c) As to Count Five:

(i) That the motion BE, and The same hereby IS, DENIED with respect to plaintiff bookstores' claims against defendants Cassilly and Garland; and

(ii) That the motion BE, and the same hereby IS, GRANTED in all other respects;

(3) That Plaintiffs' Motion for Partial Summary Judgment (Paper 45) BE, and the same hereby IS, DENIED;

(4) That JUDGMENT BE, and the same

hereby IS, ENTERED in favor of the defendants Mele, Bane, Stonesifer, Harkins, Hopkins, Keck, and Way, and against plaintiffs U.S. Books, Edgewood Books, McGinnis, Fulton, LaVodie, Cage, Koenig, and Palmer;

(5) That the remaining claims pending in the case are as follows:

(a) Claims of plaintiff bookstores in Count One against Taylor and Cassilly;

(b) Claim of plaintiffs LaVodie, Cage, Koenig and Palmer in Counts Two and Four against defendants Taylor, Golding, Mitchell, Barlow, and Sherron;

(c) Claims of plaintiff bookstores in Count Five against defendants Taylor, Cassilly, and Garland; and

(6) That the Clerk shall mail a copy of this Order and the accompanying Opinion forthwith to counsel of record.

Walter E. Black, Jr.
Senior Judge

CONSTITUTION OF THE UNITED STATES

AMENDMENTS TO THE CONSTITUTION.

[AMENDMENT I]

[Freedom of Religion, of Speech, and of the Press]

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * * * * *

[AMENDMENT IV]

[Security from Unwarrantable Search and Seizure]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[AMENDMENT XIV]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor

shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * * *

ANNOTATED CODE OF MARYLAND
ARTICLE 27

NUDITY AND SEXUAL DISPLAYS

Subsection 416A. Definitions.

The following words and phrases, as used in this subheading, have the meanings indicated:

(a) "Advertising purposes" means the purpose of propagandizing in connection with the sale commercially of a product or products, or the offering commercially of a service, or the exhibiting commercially of entertainment.

(b) "minor" means any person under eighteen years of age.

(c) "Sadomasochistic abuse" means flagellation or torture by or upon a human who is nude, or clad in undergarments, or in a revealing or bizarre costume, or the condition of one who is nude or so clothed and is being fettered, bounds, or otherwise physically restrained.

(d) "Sexual conduct" means human masturbation, sexual intercourse, or any touching of or contact with genitals, pubic areas or buttocks of the human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex, or between humans and animals.

(e) "Sexual excitement" means the condition of human male or female genitals, or the breasts of the female,

when in the state of sexual stimulation, or the sensual experiences of humans engaging in or witnessing sexual conduct or nudity.

Subsection 416D. Displaying certain visual representations for advertising purposes.

(a) Any person, firm or corporation is guilty of a misdemeanor if it knowingly displays for advertising purposes any picture, photograph, drawing, sculpture or other visual representation or image of a person or portion of the human body that depicts sadomasochistic abuse, sexual conduct, or sexual excitement, or any verbal description or narrative account of these activities or items.

(b) Any person, firm, or corporation is guilty of a misdemeanor, if it knowingly permits any such display on premises owned, rented, or managed by it.

Subsection 416F. Employee presumed to be operator of premises.

Any employee of a person operating premises on which a public display in violation of this subheading takes place, and who is on the premises at the time of the violation, is presumed to have been the operator of the premises at the time the violation occurred.
(1971, Ch. 494)

Supreme Court, U.S.
FILED
JAN 14 1999
CLERK

No. 98-975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

JOSEPH J. LAVODIE, SUCCESSOR DIRECTOR-TRUSTEE FOR 3011 CORPORATION, T/A U.S. BOOKS; AND L.R. NEWS, INC., T/A EDGEWOOD BOOKS,

Petitioners,

v.

JOSEPH I. CASSILLY, INDIVIDUALLY AND AS STATE'S ATTORNEY, HARFORD COUNTY, MARYLAND; M. TERESA GARLAND, INDIVIDUALLY AND AS ASSISTANT STATE'S ATTORNEY, HARFORD COUNTY, MARYLAND; AND J.R. TAYLOR, INDIVIDUALLY AND AS DEPUTY SHERIFF, HARFORD COUNTY, MARYLAND,

Respondents,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT TAYLOR'S BRIEF IN OPPOSITION

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2788

QUESTIONS PRESENTED FOR REVIEW

1. Is Deputy Sheriff Taylor entitled to qualified immunity with respect to his role in the preparation and execution of search warrants for two adult bookstores, where: the warrants were factually complete and accurate; Taylor presented the warrant applications and affidavits to the state's attorney for a determination of the sufficiency of the probable cause showing; and Taylor then presented the approved applications and affidavits to a state court judge, who reviewed them, determined they sufficiently established probable cause and signed and issued the warrants?

2. Is Taylor entitled to qualified immunity with respect to his role in the preparation and execution of search warrants for two adult bookstores, where the warrants complied with all of the requirements of the Fourth Amendment and where the bookstores deliberately destroyed or caused the spoilation of all of the evidence necessary to determine obscenity and thereby whether any of the bookstores' First Amendment rights were violated?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 2

STATEMENT OF FACTS 4

REASONS FOR DENIAL OF THE PETITION FOR CERTIORARI 7

A. The Fourth Circuit Correctly Applied Long-Standing Precedents Of This Court When It Determined That Taylor's Conduct Was Objectively Reasonable In Light Of Clearly Established Law And Ruled That He Was Entitled To Qualified Immunity 7

B. The Adult Bookstores Should Not Be Afforded Any Presumption Of Non-Obscenity Where They Have Deliberately Destroyed The Only Evidence From Which The Obscenity Determination Can Be Made 17

CONCLUSION 25

TABLE OF AUTHORITIES

Cases

A Quantity of Copies of Books v. Kansas, 378 U.S. 206 (1964) 8, 18

Anderson v. Creighton, 483 U.S. 635 (1987) 16

Beil v. Lakewood Engineering and Mfg. Co., 15 F.3d 546 (6th Cir. 1994) 23, 24

Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46 (1989) 8, 18

FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990) . . 17

Heller v. New York, 412 U.S. 483 (1973) 18

Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979) 9, 10, 14, 18, 19

Malley v. Briggs, 475 U.S. 335 (1986) 2, 7-9, 17

Marcus v. Search Warrants of Property at 104 East Tenth Street, Kansas, 367 U.S. 685 (1961) 8, 18

Massachusetts v. Sheppard, 468 U.S. 981 (1984) 2, 10-12, 16, 17

Miller v. California, 413 U.S. 22 (1973) . . . 17-20, 24, 25

Mitchell v. Forsyth, 472 U.S. 511 (1985) 1

New York v. Ferber, 458 U.S. 747 (1982) 19

New York v. PJ Video, Inc., 475 U.S. 868 (1986) 18

Pritchett v. Alford, 973 F.2d 307 (4th Cir. 1992) . . 12, 15

Roth v. United States, 354 U.S. 476 (1957) 17

Torchinsky v. Siwinski, 942 F.2d 257 (4th Cir. 1991) 12, 14, 15

United States v. Dornhofer, 859 F.2d 1195 (4th Cir. 1988) 20

United States v. Leon, 468 U.S. 897 (1984) 2, 8-10

United States v. Reidel, 402 U.S. 351 (1971) 17

United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971) 17

Welsh v. United States, 844 F.2d 1239 (6th Cir. 1988) . 23

Constitutional Provisions, Statutes and Treatises

Md. Code Ann. Art. 27, §416D 4

No. 98-975

IN THE

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OCTOBER TERM, 1998

JOSEPH J. LAVODIE, SUCCESSOR DIRECTOR-TRUSTEE FOR 3011 CORPORATION, T/A U.S. BOOKS; AND L.R. NEWS, INC., T/A EDGEWOOD BOOKS,

Petitioners,

V.

JOSEPH I. CASSILLY, INDIVIDUALLY AND AS STATE'S ATTORNEY, HARFORD COUNTY, MARYLAND; M. TERESA GARLAND, INDIVIDUALLY AND AS ASSISTANT STATE'S ATTORNEY, HARFORD COUNTY, MARYLAND; AND J.R. TAYLOR, INDIVIDUALLY AND AS DEPUTY SHERIFF, HARFORD COUNTY, MARYLAND,

Respondents,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT TAYLOR'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner, Joseph J. LaVodie, is the Successor Director-Trustee for two adult bookstores (the "adult bookstores"), 3011 Corporation and L.R. News, Inc.. Respondent, J.R. Taylor ("Taylor"), is a deputy of the Sheriff of Harford County, Maryland.

This case arises out of a multi-count complaint that the adult bookstores and several other plaintiffs filed in the United States District Court for the District of Maryland against the Harford County State's Attorney, one of his assistant state's attorneys, the Sheriff of Harford County, twelve deputy sheriffs and other defendants subsequently dismissed from the case. The adult bookstores and the other plaintiffs seek monetary relief for the actions that defendants allegedly took in applying for and executing search and seizure warrants which authorized the search and seizure of the two adult bookstores.

On July 24, 1997, the United States District Court (Black, J.) granted in part and denied in part the summary judgment motions filed by Taylor and the other defendants, holding that they were entitled to qualified immunity as to most of the claims pending against them but also finding that they were not entitled to qualified immunity with respect to the claims of the adult bookstores which challenged their role in the preparation and execution of the warrants. Taylor took an immediate appeal from the United States District Court's denial of immunity pursuant to *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

The Fourth Circuit Court of Appeals reversed the ruling of the United States District Court. It held that in light of the undisputed material facts concerning the actions of

Taylor, he was clearly entitled to qualified immunity. In the Petition for Certiorari, the adult bookstores seek to have the holding of the Fourth Circuit reversed.

SUMMARY OF THE ARGUMENT

The Fourth Circuit Court of Appeals correctly followed and applied the long-standing precedents of this Court to grant Taylor qualified immunity from the claims of the adult bookstores.

Taylor's conduct with respect to the procurement and execution of the search warrants for the adult bookstores was objectively reasonable as a matter of law. The warrant applications and affidavits prepared by Taylor were factually accurate and set forth in detail the places to be searched and the items to be seized. Taylor submitted the applications, the supporting affidavits and the warrants to the Harford County State's Attorney for review and approval. The state's attorney advised Taylor that the warrant packages made a legal sufficiency showing of probable cause and otherwise were legally sufficient. Taylor then submitted the approved applications, affidavits and warrants to a state court judge, who reviewed and approved them for sufficiency of the probable cause determination and issued the warrants for the adult bookstores which were executed by Taylor and others. Under the principles announced by this Court in *Malley v. Briggs*, 475 U.S. 335 (1986); *Massachusetts v. Sheppard*, 468 U.S. 981 (1984); and *United States v. Leon*, 468 U.S. 897 (1984), this Court has found as a matter of law that conduct directly analogous to Taylor's conduct entitles a police officer to qualified immunity from §1983 claims predicated on the

alleged deficiency of the warrants, even if the warrants actually were constitutionally deficient.

The search warrants, which adopted and incorporated the applications and affidavits supporting their issuance, complied with all of the requirements of the Fourth Amendment. In light of the First Amendment presumption of the non-obscenity of adult pornography, the adult bookstores contend that the warrants and searches conducted pursuant thereto were unconstitutional because the warrants were issued and executed prior to the utilization of a procedure designed to focus searchingly on the question of the obscenity of the materials for which the warrants authorized seizure. Even if entitlement to such a procedure was clearly established as a matter of law, entitlement to that procedure hinges upon whether the materials at issue are obscene. There is no entitlement to that procedure if the materials are obscene. As a general matter, the adult bookstores should bear the burden of proving that the materials at issue were not obscene as part of their *prima facie* civil case for monetary damages. Even if the warrant applicant is saddled with the initial burden of proving the obscenity of the materials which were seized, the applicant, in this case Taylor, should be relieved of that burden because the adult bookstores deliberately destroyed all of the evidence (i.e., the magazines, journals and video jackets) necessary to establish obscenity. The adult bookstores cannot be allowed to obtain the benefit of a presumption of non-obscenity when their deliberate acts caused the purposeful destruction of the only evidence available to Taylor to establish the obscenity of the items seized and thus his defense that his conduct did not infringe on any of the constitutional rights of the adult bookstores.

STATEMENT OF FACTS

This case has its origins in the application for and execution of search and seizure warrants for the two adult bookstores. The warrants were issued by the appropriate state court after a state judge reviewed the search warrant applications and supporting affidavits and determined that they supported the issuance of the warrants on which the claims of the adult bookstores are predicated.

In 1989, the Harford County State's Attorney, in conjunction with the Harford County Sheriff's Office, began an investigation into whether the adult bookstores were renting or selling sexually oriented video films, books, magazines, sexual aids and related materials in violation of Maryland's criminal display statute, Md. Code Ann. Art. 27, §416D. In connection with the investigation, Harford County State's Attorney Joseph Cassilly ("Cassilly") met with prosecutors and investigators from the Baltimore County State's Attorney's Office and the Baltimore County Police Department who had conducted a similar criminal investigation and prosecution of an adult bookstore located in Baltimore County. Cassilly obtained information from the Baltimore County officials, including copies of the application, affidavit and search and seizure warrant they used, for purposes of planning the investigation and prosecution of the adult bookstores.

After those initial meetings with Baltimore County, Taylor was assigned as the lead deputy in the investigation of the adult bookstores. Cassilly and Taylor met several times to discuss how to build probable cause for search and seizure warrants for the adult bookstores and how to prepare the warrant applications and supporting affidavits. Cassilly

advised Taylor to pattern his investigation after the investigation conducted by the Baltimore County officials and to pattern the warrant applications and affidavits after the samples Cassilly had obtained from Baltimore County.

Taylor visited each bookstore in civilian clothes and observed the location and identifying characteristics of the two stores, including how materials were displayed and how business was transacted. Taylor also purchased two magazines in each store. Taylor then met with Cassilly to discuss what he had done and to determine whether he had developed sufficient factual information to establish probable cause and to obtain warrants. Cassilly advised Taylor that he had sufficient information, so Taylor prepared warrant applications and affidavits for the adult bookstores. After preparing the warrant applications, supporting affidavits and warrants, Taylor submitted them to Cassilly for Cassilly's review and approval. Cassilly approved the warrant packages, finding that they were legally sufficient and made a sufficient showing of probable cause to obtain search and seizure warrants for both adult bookstores.

Taylor is a trained law enforcement officer. He has no legal training. That is why he relied on the guidance, advice and expertise of Cassilly in the preparation of the warrant packages which he submitted to the court. Taylor felt particularly confident in relying on the advice of Cassilly because Cassilly had been a prosecutor for over a decade and had provided recruit class training and in-service training on search and seizure warrant issues to deputies and prospective deputies of the Harford County Sheriff's Office. Thus, Taylor perceived that Cassilly was particularly capable and well-

versed in the legalities of search and seizure warrants and procedures.

On June 9, 1989, Taylor filed with the Circuit Court for Harford County, Maryland the affidavits and applications for the search and seizure warrants for the adult bookstores. Taylor appended to each application and affidavit the front and back covers of the two magazines he had purchased at each store. The applications and affidavits described in explicit detail the location of the adult bookstores, the criminal display law under which evidence collection was sought through the warrant, the places to be searched, the contents of the covers of the two magazines purchased from the stores, the types of materials displayed at the stores and the types of materials for which the warrants were to authorize seizure.

A state court judge reviewed and approved the warrant application for each adult bookstore and issued signed warrants for each bookstore. The warrants provided the statutory definition of the Maryland criminal display laws, a violation of which provided grounds for the issuance of the warrants. The warrants particularly described the location and layout of each bookstore and stated that the judge was:

> [S]atisfied that there is probable cause to believe that there is now being displayed for advertising purposes and sold for commercial gain, books, magazines, photographs, films and posters which depict sadomasochistic abuse, sexual conduct, and sexual excitement on the premises hereinbefore described and that the foregoing grounds for issuance of the Search Warrant exists [sic].

The warrants incorporated the applications and affidavits and stated that the applications and affidavits provided the probable cause for the warrant issuance.

The warrants were executed on June 13, 1989.

REASONS FOR DENIAL OF THE PETITION FOR CERTIORARI

The adult bookstores suggest that the Fourth Circuit ignored the precedents of this Court when it ruled that Taylor was immune from their claims. To the contrary, the Fourth Circuit correctly applied the precedents of this Court in holding that Taylor enjoyed a qualified immunity. The adult bookstores have not argued that there is any conflict between the circuits which necessitates the grant of their petition. They have not argued that any compelling public interest necessitates the grant of the petition. This case does not merit the scrutiny of this Court.

A. The Fourth Circuit Correctly Applied Long-Standing Precedents Of This Court When It Determined That Taylor's Conduct Was Objectively Reasonable In Light Of Clearly Established Law And Ruled That He Was Entitled To Qualified Immunity.

The United States District Court misapplied the qualified immunity test of *Malley* in determining that Taylor did not enjoy qualified immunity from the §1983 claims of the bookstores in Counts One and Five of the Complaint, which were predicated on the alleged infirmity of the search

warrants. The United States District Court denied Taylor qualified immunity because the materials for which the warrants authorized seizure were not subject to a procedure designed to focus searchingly on the question of obscenity, which the United States District Court perceived was in violation of clearly established law.[1] The United States District Court never considered the undisputed material facts relative to Taylor's conduct, and it failed to consider the objective reasonableness of Taylor's conduct. When the Fourth Circuit made a *de novo* review of the summary judgment record, it found that Taylor clearly was entitled to qualified immunity based on the long-standing principles established by this Court.

In *Malley*, this Court held:

> [T]he same standard of objective reasonableness that we applied in the context of a suppression hearing in *Leon, supra*, defines the qualified immunity accorded an officer whose request for a warrant allegedly caused an unconstitutional arrest. Only where the warrant application is so lacking indicia of probable cause as to render official belief in its existence unreasonable, *Leon, supra*, at 923,

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[1] In *A Quantity of Copies of Books v. Kansas*, 378 U.S. 206 (1964), and *Marcus v. Search Warrants of Property at 104 East Tenth Street, Kansas*, 367 U.S. 685 (1961), this Court held that a search warrant which authorized a mass seizure of published materials prior to a procedure designed to focus searchingly on the question of obscenity was unlawful. *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 62-63 (1989).

> 104 S.Ct. at 3421, will the shield of immunity be lost. (Footnote omitted.)

Malley, 475 U.S. at 345. Thus, the test of objective reasonableness applied by the Court in *Leon* is the test to follow in evaluating Taylor's entitlement to qualified immunity in this case.

In *Leon*, this Court developed the below criteria to evaluate when it would be unreasonable for an officer who obtained a warrant to believe that the warrant established probable cause:

> 1. When the officer knew, or except for his reckless disregard of the truth would have known, that the information in the affidavit was false;
>
> 2. When the magistrate or judge who issued the warrant "wholly abandoned his judicial role in the manner condemned in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 99 S.Ct. 2319, 60 L.Ed.2d 920 (1979)";
>
> 3. When the warrant application was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable"; or
>
> 4. When the warrant was "so facially deficient -- i.e., in failing to particularize the place to be searched or the things to be seized -- that executing officers

> could not reasonably presume it to be valid. *Cf. Massachusetts v. Sheppard*, 468 U.S. at 988-991, 104 S.Ct. at 3428-3430."

Leon, 468 U.S. at 923.

In *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979), the town justice issued a search warrant which authorized the seizure of unidentified items which the court independently determined to violate New York's obscenity statute. The justice who issued the warrant actually accompanied the police to the bookstore and examined the materials in the store, making on-the-spot determinations of what materials were obscene and thus could be seized. The police officers seized all of the materials from the bookstore that the town justice determined were obscene during the search. This Court invalidated the search warrant because it authorized the seizure of items that had not been determined to be obscene prior to its issuance and suppressed the evidence seized at the direction of the town justice while he was at the bookstore. *Lo-Ji Sales, Inc.*, 442 U.S. at 326. This Court opined that the justice had failed to fulfill his role as a neutral and detached judicial officer, removed from the often competitive enterprise of ferreting out crime under the pressure of time constraints. *Id.* This Court found that it was improper for a search warrant to be issued by a justice who became a part of, if not the leader of, the search party because the justice had become an adjunct of the law enforcement officers. *Lo-Ji Sales, Inc.*, 442 U.S. at 327.

In *Massachusetts v. Sheppard*, 468 U.S. 981 (1984), the sole issue before this Court was whether the police officers reasonably believed that the search they conducted was

authorized by a valid warrant. While the affidavit and application for the warrant particularly described the items to be seized, the warrant itself failed to describe the items to be seized and, therefore, was constitutionally deficient and technically invalid. This Court recited several factors in support of its finding that the officer's conduct in the procurement and execution of the warrant was objectively reasonable. First, the officer who prepared the affidavit had it reviewed by the district attorney for a determination of the sufficiency of the probable cause showing. Then, the officer presented the affidavit to a judge. The judge reviewed the affidavit and concluded that it established sufficient probable cause for the search. The officer advised the judge that because it was a Sunday, he only had a drug search application and warrant form available, not the form normally used for a homicide search. The officer suggested that there may be some problems with the form the officer had presented to the judge. The judge reviewed the forms and advised the officer that the judge would make any necessary changes, which the judge appeared to do while the officer waited for the judge to execute the warrant. This Court concluded that:

> [T]he police conduct in this case clearly was objectively reasonable and largely error-free. An error of constitutional dimensions may have been committed with respect to the issuance of the warrant, but it was the judge, not the police officers, who made the critical mistake.

Sheppard, 468 U.S. at 990. This Court also noted that:

> In Massachusetts, as in most jurisdictions, the determinations of a judge acting within his jurisdiction, even if erroneous, are valid and binding until they are set aside under some recognized procedure. (Citations omitted.)

Sheppard, 468 U.S. at 990. The Court implied that the officers, having a warrant which appeared to be valid, were duty bound to execute it.

The undisputed facts in this case overwhelmingly evince that Taylor's conduct in the procurement and execution of the warrants at issue was objectively reasonable under the applicable criteria of this Court. Under such circumstances, the objective reasonableness determination is ultimately a question of law for the trial court to determine. *Pritchett v. Alford*, 973 F.2d 307, 313 (4th Cir. 1992); *Torchinsky v. Siwinski*, 942 F.2d 257, 260 (4th Cir. 1991).

Shortly after Taylor was assigned primary responsibility for assisting the State's Attorney's Office in the investigation of the adult bookstores, he met with Cassilly to inquire about what work to undertake in order to develop the probable cause necessary to obtain valid search warrants for the bookstores. Cassilly explained to Taylor that Cassilly had spoken with prosecutors and police officers in Baltimore County who had conducted a very similar type of investigation and prosecution. Cassilly provided Taylor with a copy of the warrant application and affidavit and the warrant used by Baltimore County in its investigation. In light of Cassilly's direction, Taylor patterned his investigatory effort in order to develop the information necessary to prepare an affidavit and

application similar to that prepared by the Baltimore County police detectives.

Taylor, in civilian clothes, visited the adult bookstores and made observations about the location and identifying characteristics of each store, the type of materials displayed, how materials were displayed and how business was transacted. In addition, he purchased two magazines at each store. After conducting his investigation and purchasing the magazines, Taylor met with Cassilly to discuss whether Cassilly felt Taylor had conducted a sufficient investigation to establish probable cause and to prepare applications and affidavits for search warrants for the two stores. Cassilly advised that Taylor had conducted a sufficient enough investigation and directed him to prepare the applications, supporting affidavits and warrants patterned after those prepared by Baltimore County.

After preparing the warrant packages, Taylor showed them to Cassilly. Cassilly advised Taylor that the applications, the supporting affidavits and the warrants were legally sufficient and were ready for submission to the court.

Taylor relied on and interpreted Cassilly's approval of the applications and affidavits as signifying that they made a sufficient showing of probable cause and were in all other respects legally sufficient to obtain a valid search and seizure warrant for the bookstores. Cassilly knew that the deputies looked to the State's Attorney's Office to make sure that the legal requirements necessary to obtain a valid search and seizure warrant were satisfactorily completed. Cassilly knew that Taylor considered Cassilly's approval as confirmation that the warrant packages were legally sufficient.

At the time Cassilly approved the affidavits and applications for the bookstores, he had been working at the State's Attorney's Office for approximately 12 years, and he had been the state's attorney for approximately 6 years. Not only was he the state's attorney, but he also was the person who provided training to the deputies on Fourth Amendment search and seizure issues on a routine basis. Cassilly was not an inexperienced assistant state's attorney. There has not been any suggestion that Taylor tried to hoodwink a junior assistant state's attorney into approving a defective warrant application. To the contrary, Taylor knew that Cassilly provided the Sheriff's Office with training on search and seizure issues and, therefore, implicitly trusted his guidance with respect to the preparation and approval of the warrant packages at issue in this case. Taylor's reliance on Cassilly was objectively justified. *Torchinsky*, 942 F.2d at 263 (the Fourth Circuit found it was reasonable for a police officer to rely on the advice of his supervisor, who was a certified instructor of criminal investigative techniques, a 13-year veteran of detective work and had expressed belief that the officer had established probable cause).

Taylor submitted the applications and affidavits to the Honorable Cypert O. Whitfill, the judge who signed the warrants. Judge Whitfill was and still is a sitting judge of the Circuit Court of Maryland for Harford County. Unlike the town justice in *Lo-Ji Sales, Inc.*, Judge Whitfill was not involved in the investigation of the bookstores. Judge Whitfill reviewed the affidavits and applications as a neutral and detached judicial officer of the State of Maryland and then issued the warrants.

Taylor obtained a warrant from a neutral judge, and he is entitled to receive considerable protection from suit under 42 U.S.C. §1983. *Torchinsky*, 942 F.2d at 262. Otherwise, the threat of liability will force officers to continually second-guess the considered decisions of magistrates, which will in turn promote delay in the execution of warrants and alter the proper allocation of law enforcement functions. *Id.* Moreover, if a reasonable mistake is actionable, difficult questions of discretion always will be resolved in favor of inaction and effective law enforcement will be lost. *Torchinsky*, 942 F.2d at 261.[2]

The search warrants for the two bookstores (which adopted and incorporated the applications and affidavits) were seven and eight pages in length respectively (exclusive of attachments). The affidavits and applications, in great detail, described the names and locations of each bookstore, the crime that was being investigated, the places to be searched and the materials for which seizure was authorized. Taylor double-checked his investigatory notes to make sure that all of the

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[2]The Fourth Circuit also recognizes that the qualified immunity defense affords tolerance to good faith mistakes of judgment traceable to unsettled law, faulty information or contextual exigencies as it was deliberately designed to protect all but the plainly incompetent or those who knowingly violate the law. *Pritchett*, 973 F.2d at 313. The bookstores are questioning Taylor's conduct because he relied on the probable cause determination of a neutral and detached judge and the assurances of the state's attorney that his warrant application and affidavit made a legally sufficient showing of probable cause. The qualified immunity defense exists to prevent such second-guessing.

factual statements and descriptions in the applications and affidavits were accurate and correct. The owners and managers of the adult bookstores admitted that there were not any factual misstatements in the affidavits.

Taylor's conduct in this case is directly analogous to the conduct this Court held to be objectively reasonable as a matter of law in *Sheppard*. Taylor scrupulously adhered to the basic parameters of the Fourth Amendment's requirements for a warrant affidavit and application (e.g., packages identified with particularity the places to be searched and described with reasonable particularity the materials to be seized). There is no suggestion that Taylor lied or included any false or misleading information in the warrant packages he prepared. Taylor took reasonable steps to verify the accuracy of the information in the warrant packages he prepared and presented them to a neutral and detached judicial officer. Taylor satisfied all of the requirements of the Fourth Amendment.

An officer cannot be expected to be an attorney. An officer should not be expected to research the law and to ascertain and understand the nuances of the First Amendment's overlay on the Fourth Amendment requirements for a search warrant for an adult bookstore. Taylor was not an attorney and did not have any such training. Certainly, it is unreasonable to expect Taylor to appreciate the First Amendment nuances and their implications with respect to the search warrants at issue in this case. Even if, for sake of argument, the search warrants in this case are assumed to have been constitutionally defective, any mistake of constitutional dimension was made by the judge and/or the state's attorney, not by Taylor. *Accord*, *Anderson v. Creighton*, 483 U.S. 635, 641 (1987) (in the context of a warrantless search, this Court

has recognized "that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and [has] indicated that in such cases those officials - like other officials who act in ways they reasonably believe to be lawful - should not be held personally liable.")

The qualified immunity defense protects "all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341. Taylor's conduct was objectively reasonable and largely error-free. *Sheppard*, 468 U.S. at 989-90. Taylor enjoys qualified immunity from the claims of the bookstores under Counts One and Five of the Complaint.

B. The Adult Bookstores Should Not Be Afforded Any Presumption Of Non-Obscenity Where They Have Deliberately Destroyed The Only Evidence From Which The Obscenity Determination Can Be Made.

Obscene materials are not protected by the First Amendment. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 224 (1990); *Miller v. California*, 413 U.S. 22, 23 (1973); *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 376 (1971); *United States v. Reidel*, 402 U.S. 351, 354 (1971); *Roth v. United States*, 354 U.S. 476, 485 (1957). It follows naturally, therefore, that obscene materials may be seized as long as the requirements of the Fourth Amendment are satisfied. The Fourth Amendment requires only that a search warrant be supported by probable cause predicated on an affidavit particularly describing the place to be searched and the persons or things to be seized. Complexity and confusion

with respect to the seizure of pornography[3] arises as a result of the First Amendment overlay onto standard Fourth Amendment seizure requirements. The subtle differences attributable to the First Amendment overlay are made manifest through a comparison of the difference between the warrant requirements for the seizure of child pornography and adult pornography.

When the law enforcement branch of government initiates a seizure of adult pornography, a rebuttable presumption of non-obscenity exists. Thus, in addition to the normal Fourth Amendment warrant requirements that the law enforcement branch must observe before initiating a seizure, the First Amendment imposes a requirement to evoke some procedure which is designed to focus searchingly on the question of obscenity. *Fort Wayne Books, Inc.*, 489 U.S. at 62-63. *Accord, Marcus, supra; A Quantity of Copies of Books, supra; Heller v. New York*, 412 U.S. 483 (1973); *Lo-Ji Sales, Inc., supra; Fort Wayne Books, Inc., supra; New York v. PJ Video, Inc.*, 475 U.S. 868 (1986). Under that procedure, a neutral and detached representative of the judicial branch of government must apply the *Miller* standard[4] and conclude that

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[3]Pornography, as the term is used in this brief, shall refer to and include expressive materials (e.g., books, magazines, videos and films) which depict sexual intercourse, bestiality, masturbation, sadistic or masochistic abuse or lascivious exhibition of the genitals or pubic area (i.e., the type of subject matter typically proscribed by constitutional obscenity laws).

[4]Under the *Miller* standard, adult pornography is not considered obscene unless the average person, applying

the items for which seizure is authorized are obscene. *Lo-Ji Sales, Inc.*, 442 U.S. at 326-27. This Court adopted the *Miller* standard as:

> [A]n accommodation between the State's interests in protecting the 'sensibilities of unwilling recipients' from exposure to pornographic material and the dangers of censorship inherent in unabashedly content-based laws.

New York v. Ferber, 458 U.S. 747, 756 (1982).

In contrast, when the law enforcement branch of government seeks to seize child pornography, there is no First Amendment overlay onto the standard Fourth Amendment warrant requirements. In light of the State's heightened responsibilities and obligations for the protection of minors, this Court has not applied a presumption of non-obscenity with respect to child pornography, i.e., this Court has held that the *Miller* standard is not applicable to child pornographic expressive materials. *Ferber*, 458 U.S. at 764. As long as the category of sexual conduct which constitutes child pornography is suitably limited and described, child pornography is presumed to be obscene. *Id.* Thus, there need not be a prior particularized showing of obscenity before a

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contemporary community standards, would find that the materials, taken as a whole, appeals to the prurient interest, depicts or describes in a patently offensive way the sexual conduct proscribed by the applicable state law and, taken as a whole, lack serious literary, artistic, political or scientific value. *Miller*, 413 U.S. at 24.

search warrant may validly authorize the seizure of child pornography. *United States v. Dornhofer*, 859 F.2d 1195, 1198 (4th Cir. 1988).

The warrants at issue in this case contained the same degree of detail and particularity as warrants which have been held to be constitutionally sufficient in the context of a seizure of child pornography. Thus, the warrants at issue in this case complied with all of the requirements of the Fourth Amendment. The warrants described in considerable detail the places to be searched and the things to be seized. They also identified the criminal acts being investigated. The warrants adopted and incorporated the attached applications and affidavits of Taylor, which contained the detailed information concerning Taylor's investigative activities necessary for the United States District Court to confirm the existence of probable cause. The warrants identified with reasonable particularity the materials for which they authorized seizure. The warrants were issued by a neutral and detached Maryland judge. A search and seizure inventory was prepared which listed all of the items seized by the officers at each bookstore, and a copy of the inventory was provided to the bookstores. A copy of the inventory was also filed with the state court that issued the warrant. The warrants and the searches and seizures at issue complied with the mandates of the Fourth Amendment.

The alleged constitutional deficiency in this case arises from the overlay of First Amendment requirements onto the standard Fourth Amendment warrant requirements, i.e., the presumption of non-obscenity of adult pornography absent a *Miller* standard determination by a neutral and detached member of the judicial branch of government. To Taylor's

knowledge, there are no cases which apply this presumption in the context of a civil 42 U.S.C. §1983 claim for monetary damages.

The bookstores cannot prevail if the adult pornographic materials that were seized are obscene because the warrants in this case clearly met the requirements of the Fourth Amendment. The only arguably deficient conduct of the government defendants in this case was the alleged failure to evoke a procedure which provided the requisite searching focus on the question of obscenity. That First Amendment prerequisite is violated only if the materials that were actually seized were not obscene because obscene pornography is not afforded First Amendment protection. Thus, the viability of the claims of the adult bookstores hinges on the obscenity or non-obscenity of the items that were seized.

The only evidence upon which an obscenity determination can be made are the magazines, books, video film jackets and other seized items. All of the materials seized from the bookstores in this case (except for the items attached as exhibits to the Sheriff's Office Defendants' Memorandum in Support of Summary Judgment) were returned to the bookstores pursuant to an order of the federal district court. However, the adult bookstores, according to the testimony of LaVodie, one of the owners and managers of the stores, either burned or repackaged and sold all of the seized items that were returned without making any record of those items. The deliberate actions of the adult bookstores have caused the destruction and the spoilation of the only evidence from which an obscenity determination can be made. Those deliberate acts have precluded Taylor from proffering any evidence on the obscenity issue.

The adult bookstores should not be allowed to profit from their deliberate acts of destruction and spoilation of that critical evidence. Under such circumstances, the burden should be shifted to the adult bookstores to prove that the items which they destroyed were not obscene and, therefore, worthy of First Amendment protection.

The adult bookstores have been represented by the same counsel that is representing them in this civil lawsuit since no more than two weeks after the search and seizure operations giving rise to this litigation. The bookstores' counsel has argued from the outset that obscenity could be determined only upon a thorough examination of the seized materials. Nevertheless, the bookstores burned (destroyed) the seized materials shortly after those materials were returned to them. This destruction of evidence was not coincidental. It was a deliberate and intentional act undertaken to foreclose Taylor of any opportunity to overcome the presumption of non-obscenity.

Shortly after the current counsel for Taylor entered his appearance in this case, a copy of all of the seized materials that had been returned to the bookstores was requested. The bookstores have done everything possible to prevent Taylor from gaining possession of any of the seized materials, and the bookstores ardently urged the United States District Court to require Taylor to return all copies of the seized materials, including the materials attached as Exhibits 21-199 to the Sheriff's Office Defendants' Motion for Summary Judgment as evidence in this case. In fact, the adult bookstores, through their counsel, urged the federal district court to strike those materials from the summary judgment record.

The Sixth Circuit, in *Beil v. Lakewood Engineering and Mfg. Co.*, 15 F.3d 546 (6th Cir. 1994) and *Welsh v. United States*, 844 F.2d 1239 (6th Cir. 1988), engaged in a somewhat comprehensive analysis of the circumstances under which a party involved in the destruction of evidence should bear the burden of proof/persuasion with respect to the missing evidence. The Sixth Circuit concluded:

> Where one party wrongfully denies another the evidence necessary to establish a fact in dispute, the court should draw the strongest allowable inferences in favor of the aggrieved party. (Citation omitted.)

Welsh, 844 F.2d at 1247. The Sixth Circuit noted that there are two reasons for placing the burden of proof on the spoiler of evidence: An evidentiary rationale and a deterrent rationale. *Welsh*, 844 F.2d at 1246. The evidentiary rationale arises from the concept that a party who should know and appreciate the evidentiary value/possible relevance of evidence to litigation but nonetheless proceeds to destroy it is likely to be threatened by the evidence and, therefore, should have any negative presumptions from the evidence construed against the party and/or assume the burden of proof of a necessary element to which the evidence related. The deterrent rationale serves as a penalty, placing the risk of erroneous judgment with respect to the destruction of potentially relevant evidence on the party who destroyed it. A plaintiff who destroys evidence should be sanctioned just as surely as a defendant. *Beil*, 15 F.3d at 553. Moreover, where no evidence is available to establish an element of the plaintiff's case as a result of the plaintiff's destruction of evidence, it is

appropriate to grant summary judgment to the defendants. *Beil*, 15 F.3d at 553, n.1.

The bookstores' destruction of the seized materials has precluded the introduction of virtually any evidence upon which an obscenity determination can be predicated. If the seized materials were obscene, then none of the bookstores' constitutional rights have been violated because the warrants obtained by Taylor complied with the constitutional mandates of the Fourth Amendment.

In this case, in order for the bookstores to prevail, they should be required to prove that the materials (which were seized in compliance with the Fourth Amendment) are worthy of the First Amendment protection afforded under the *Miller* standard. In other words, the bookstores should be required to prove that the materials were non-obscene speech materials. Only if the materials are not obscene do the bookstores have any basis for claiming that their constitutional rights have been violated. Taylor should not be saddled with the burden of proving his non-culpability, i.e., that the materials that were seized were obscene.[5]

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[5]If the government defendants had destroyed the speech materials seized from the bookstores, then it would be appropriate to saddle them with the burden of proving that the seized materials were obscene because the destruction would preclude the bookstores from meeting their burden of proof. However, that is not what happened in this case. All of the materials seized from the bookstore (except the materials that were attached as exhibits to the Memorandum in Support of the Sheriff's Office Defendants' Motion for Summary Judgment) were returned to the bookstores.

With respect to the only materials still in existence and before this Court, a Harford County criminal jury applying the *Miller* standard has already determined that the materials are obscene. The warrants were not defective with respect to those materials, and Taylor is entitled to judgment on all claims predicated on those materials.

CONCLUSION

For the reasons set forth herein, the Petition for Certiorari should be denied.

Respectfully submitted,

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